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Indigenous Peoples and the Protection of Their Secret Knowledge:

A Promising Pathway Ahead

A thesis
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Abstract

This work focuses on the intangible, secret aspects of indigenous peoples' cultures and how such secret information is protected by indigenous guardians or holders. This is because much of indigenous culture is imbued with spiritual significance for indigenous peoples and, consequently, it is not made available to the rest of the community and the world at large.

This thesis examines the reasons why it is important to preserve indigenous cultures and secret practices that today survive in indigenous communities. The thesis demonstrates that secrecy is seen as essential to the preservation of indigenous secret knowledge. Indigenous guardians are responsible for the preservation of the information, and they commonly use secrecy to preserve the knowledge and, when they share it, they choose limited, confidential circumstances to do so. This work argues that it is important to make reasonable space in the existing body of laws which have so far failed to effectively protect indigenous secret practices and information. The case study described in this thesis helps understand how states are currently trying to listen, understand and accommodate indigenous claims brought forward at the national and international fora. The thesis reviews the legal protection currently available to indigenous secret knowledge in national and international law. The first 6 chapters introduce indigenous cultures, holism and indigenous peoples and international law, and chapter 7 describes the New Zealand case Wai 262 and the recommendations given by the Waitangi Tribunal. The remaining chapters analyse indigenous cultures and intellectual property laws, identifying gaps in the existing mechanisms for protection and underlining why, as of today, intellectual property law does not guarantee adequate protection to indigenous secret knowledge. The last chapter analyses the law of breach of confidence as a possible instrument to safeguard indigenous secret information and the duty of care performed by indigenous guardians in preserving such knowledge. It argues that the existing law of confidentiality can usefully evolve to protect cultural secret information as a growing category in its own right and that indigenous secret information can find protection as confidential information.

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Introduction

This thesis is about indigenous peoples' secret and sacred knowledge, about the people who act as guardians of that knowledge, and about the legal support for the guardians and the legal protection of the secret status of that knowledge. The thesis will try to explain what indigenous peoples' secret knowledge is, the role played by indigenous guardians to keep and safeguard such secret knowledge and how the law can help the custodians to preserve the knowledge from external misuse or exploitation. In doing so, the thesis will address what today constitutes indigenous peoples' traditional knowledge and cultural expressions, how important culture is for indigenous peoples, how sacred it is, and how traditional knowledge has been safeguarded by indigenous communities. At the same time, this thesis will address how important indigenous customary law is for the safeguarding of indigenous heritage, what is the role played by the guardians of the knowledge in the safeguard of indigenous cultures and traditions, why indigenous knowledge is today under threat, what has been done to safeguard it, and what still needs to be done to effectively succeed effectively in safeguarding indigenous traditions for future generation. As such, this thesis is an attempt to put together all the existing relevant legal literature related to indigenous peoples' intangible cultures in the custody of the guardians of knowledge.

The thesis first introduces indigenous peoples and the historical circumstances that made them such a vulnerable minority in the global context. It then addresses why their claims and desires to preserve their heritage for future generations are important and how the global community, being it legal or social, can adjust its initial exclusive structure to include peoples who survived annexation and near annihilation to remain factually parts of our global society, but with very distinctive cultural traditions. The thesis aims to demonstrate that participation in a global society does not have to happen at the expense of

surrendering indigenous cultural traditions. Uniformity should not and cannot be the aim of any civilized society.

This global society of which we are all members is not a perfect one. It has grown out of great wars, misunderstandings, crimes and reparations. Whether we like it or not we are all part of it. In this multicultural scenario, indigenous peoples represent our past and part of our present. As such, this thesis will try to demonstrate that indigenous claims in relation to secret knowledge are legitimate and justified, and they require a response from both the national and global communities. This thesis will also show how difficult it is for a Western legal system to include and address interests that were never included in its initial value system. The present work demonstrates that such 'reasoning' is today stronger than ever and needs structural addressing through the modification of the legal system and the consequent inclusion of concepts and perspectives that were not included at the time the Western legal system was created. This thesis does not aim to divide the world into 'the evil West' and the 'good indigenous peoples', but to address cases and situations involving indigenous peoples that are historically, ethically, morally and legally obvious, and to show a possible way ahead in which indigenous issues would find effective protection and/or solution.

The work is divided in two parts: the first half introduces and discusses indigenous cultures and secret knowledge from an historical and anthropological perspective; it defines what indigenous secret knowledge is and who the guardians of knowledge are and how indigenous cultures and traditions are protected by the international law system. The case study on Wai 262¹ connects the first half of the work to the second and gives a clear example of how indigenous cultural issues can be discussed at the national level. The second part is dedicated to the International Property (IP) Law regime and the law on Breach of Confidence, explaining why the IP law is unsuitable to protect indigenous secret knowledge, and why breach of confidence might be used by indigenous guardians to safeguarded their most secret knowledge.

¹ New Zealand Waitangi Tribunal case no. 262 - 'The Flora and Fauna and Cultural Intellectual Property Claim' [2011]

Hence, chapter 1 introduces the methodology and the historical context in which indigenous peoples have lived for the past several centuries. To understand indigenous peoples it is necessary to understand the brutality of colonization and all the tragedy it represented in terms of cultural alienation, genocidal practices, dispossessions from traditional territories, general repression and exclusion. In a way, colonization never ended. Seclusion and discrimination are still forms of colonization that impede members of a minority from being granted the same consideration and protection as any other member of the society.

Chapter 2 explains what culture is and explains how and why indigenous cultures based on holism differ from the Western idea of 'culture'. This sets the stage for chapter 3, which introduces what constitutes indigenous traditional knowledge and traditional cultural expressions. It is generally known (given the lack of a formal and widely accepted definition) that indigenous knowledge is not always clearly definable and circumscribable. The chapter will explore what the world considers indigenous secret knowledge and how the thesis will use indigenous traditional knowledge and cultural expressions. Chapter 4 will explain who indigenous guardians are and what their role entails in safeguarding indigenous cultures and heritage. The chapter will try to explain the importance of the role of the guardians, what such a role was at the time of colonization and what that same role entails today. This chapter is very important and central because guardianship and secret knowledge always go together, and one could not exist without the other. Chapter 5 will discuss indigenous peoples and international law to contextualize indigenous peoples in the international fora in order to explain what has today been achieved in protecting indigenous cultures and what still needs to be done for a more effective protection of indigenous interests and expectations. The chapter deliberately avoids any discourse on IP law (TRIPS and CBD included)² because such law systems will be amply discussed in Chapter 8 (generally) and 9 (specifically on IP, indigenous secret knowledge and guardianship).

Chapter 6 will continue to discuss indigenous cultures by connecting the international human rights (HR) and the intellectual property law systems with

² The Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) and the Convention on Biological Diversity (1993)

each other as systems which, over the years, have started to overlap, being IP, although still marginally, today included within HR laws. In this chapter the analysis is moving from international law to the IP legal system. The case study of Chapter 7 will analyze in practice how New Zealand is responding to the claims of indigenous custodians of secret knowledge. Chapter 7, in fact, will introduce and discuss a very important case, the Aotearoa/New Zealand Waitangi Tribunal Report on the Wai 262 claim, which includes wide discussion, considerations and recommendations about indigenous traditions, secret knowledge and the role of the guardians (kaitiaki) of knowledge. Never before the role of the guardian of knowledge was so thoroughly analyzed in a case of national (and international) importance. Additionally, much of what is recommended by the Waitangi Tribunal could de facto be applied to indigenous circumstances happening in other parts of the world.

Chapters 8 and 9 will specifically focus on indigenous peoples' traditional knowledge and the world intellectual property law system to demonstrate that, although significant moves have been made to protect indigenous cultures, the major intellectual property law regimes still represent an unsuitable avenue in which to safeguard the most secret knowledge held by indigenous guardians. Such unsuitability will consequently move the thesis to chapter 10, where the thesis will argue that development of the law of breach of confidence and privacy is the best approach to protecting the role of guardians in maintaining the secrecy of indigenous knowledge. In recent years litigation for breach of confidence has evolved so that secret knowledge can be included in legally protected confidential information. The Common Law system is the best option for developing a regime flexible enough to protect that indigenous knowledge that is mostly secret and guarded.

The main topic discussed in this thesis is very delicate. Being based on secrecy, it is difficult to address something whose protection resides in its secrecy. No amount of books or legal reasoning can help one understand what secret knowledge is and what it means to indigenous peoples. Every indigenous community in the world has a different understanding of secrecy and guardianship. Reducing everything to clear-cut definitions is only helpful to a

point. That is why this thesis slowly moves from what constitutes secrecy to secrecy itself as a characteristic that, alone, should become enough to guarantee its protection. This is because secret information is present and protected in every society of the world and, as such, can be regarded as the common factor that brings together indigenous cultures with mainstream societies. Contrary to what is argued by most scholars, this thesis will try progressively to prove that indigenous secret information should not be protected because it is indigenous and holistic but because it is secret.

Given the complexity of any research involving indigenous peoples' holistic traditions, the present work will investigate indigenous peoples' knowledge and traditions using a comparative and interdisciplinary method.

There is today a great abundance of legal, anthropological and philosophical material on indigenous peoples; however, very rarely do these disciplines find place in the same text. In this light, disciplines can be regarded as part of the 'same' whole they try to describe and, though they might describe the whole from a specific perspective with exclusive language, they still remain a part of the whole they represent and, therefore, fundamentally interconnected.

While a study in isolation can indeed guarantee the integrity of each discipline, it rarely answers all the questions exhaustively, and provides workable solutions.

As Citroni and Quintana Osuna state:³ "... if we are to try to understand and learn from indigenous peoples, we should do it through a multidisciplinary approach. Sociologists, anthropologists, theologians, lawyers, psychologists, artists, and obviously indigenous peoples themselves can help us to have a better idea of their complexity".⁴ Conscious of this, the author believes that all disciplines should work together for the greater good. Time has come for a new interdisciplinary collaboration among disciplines that will fill the obvious gaps each of them possess. No legal study on indigenous peoples would be complete

³ Gabriella Citroni and KI Quintana Osuna "Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights" in Federico Lenzerini (ed) *Reparations for Indigenous Peoples* (Oxford University Press, New York, 2008) at 318.

⁴ "... the judicial point of view is only one way to address the issue. Therefore, judges dealing with indigenous communities need the experience of those others that could help them to render a well-grounded judgement" see Gabriella Citroni and KI Quintana Osuna "Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights" in Federico Lenzerini (ed) *Reparations for Indigenous Peoples* (Oxford University Press, New York, 2008) at 318.

without the invaluable support of anthropologists' findings; and vice versa, no indigenous peoples' battle can be won without the help of legal scholars. This thesis has tried to effectively bridge the existing gap between the disciplines to present a harmonious and coherent analysis of what indigenous secret knowledge is, why the role of the guardians should be safeguarded in order to preserve such secret knowledge and how secret information can be accommodated and protected in the current legal system.

Chapter 1

Indigenous Peoples and the Western Philosophical, Anthropological and Political Thought.

This chapter will start with an historical and philosophical overview of Western thought prior and during the colonization time. Such historical and philosophical overview represents the context in which indigenous peoples were met and confronted from a Eurocentric belief and perspective. It is also essential to explain and justify the methodology of the present work, which has a comparative, interdisciplinary and culturally relativist approach to the subject of sacred and secret knowledge held by indigenous peoples.

In order to analyse the issues surrounding the safeguard of indigenous sacred/secret traditions, it is important to explain who indigenous peoples are, what indigenous culture is and how it differs from other forms of culture.

All the argumentation used in this chapter serve the purpose to prove that, when analysing indigenous traditions, cultural relativism and interdisciplinary analysis represent a necessary methodology so as to avoid discrimination and guarantee respect for the uniqueness of indigenous peoples' values.

1.1 - Colonization:¹ Historical and Philosophical Issues

The word 'colonization' comes from the Latin verb *colo*, whose past is *cultus* and whose future participle is *culturus*. Colonization shares with 'culture' and 'cult' (religion) the same origin. All three words include a constellation of values and practices, which include "occupying the land, cultivating the earth, the

¹ "Colonialism is a practice of domination, which involves the subjugation of one people to another. ... the term colony comes from the Latin *colonus*, meaning farmer. This root reminds us that the practice of colonialism usually involved the transfer of population to a new territory, where the arrivals lived as permanent settlers while maintaining political allegiance to their country of origin. ... It is not a modern phenomenon. World history is full of examples of one society gradually expanding by incorporating adjacent territory and settling its peoples on newly conquered territory. ... the modern European colonial project emerged when it became possible to move large numbers of people across the ocean and to maintain political sovereignty in spite of geographical dispersion. The term colonialism is frequently used to describe the settlements of North America, Australia, New Zealand, Algeria, and Brazil, places that were controlled by a large population of permanent European residents" see M Kohn "Colonialism" (2006) electronic document <<http://stanford.library.usyd.edu.au/entries/colonialism/>> last visited on 11/12/2014.

affirmation of origins and ancestors, and the transmission of inherited values to new generations".²

Colonization as such pre-existed the European colonial wave. It was a practice in usage by Greece, Rome, the Incas and the Aztec as well as many other groups. While the initial waves of colonization mostly interested adjacent territories, European colonialism soon reached a planetary dimension whose aim was to subjugate the world to a universal regime of truth and power. In the words of Shohat and Stam,³ colonialism is "ethnocentrism armed, institutionalized, and gone global". The most evident corollaries of colonialism were: "the expropriation of territory on a massive scale; the destruction of indigenous peoples and their cultures; the enslavement of Africans and Native Americans; the colonization of Africa and Asia; and racism not only within the colonized world but also within Europe itself".⁴ Not only did the encounter between Europeans and indigenous peoples had political and economic repercussions for the inhabitants of the new lands, but the impact of it greatly compromised the integrity of indigenous cultures.

During most of the time of colonization (also known as the Age of Discovery of the 16th and 17th century),⁵ Western settlers perceived indigenous peoples from their own evolutionary and scientific tradition, without being able, in most cases, to grasp fully the complex universe in which indigenous peoples lived. It is correct to say that eventually Western societies ended up labelling indigenous peoples as 'primitive'⁶ (from a Western standpoint) and unworthy of any 'special'

² Alfredo Bosi *Dialectica de la Colonizacion* (Companhia das Letras, San Paulo, 1992) at 11 and 19.

³ Ella Shohat and Robert Stam *Unthinking Eurocentrism* (Routledge, London and New York, 1994) at 16; "The colonial process had its origins in internal European expansions (the Crusades, England's move to Ireland, the Spanish *reconquista*), made a quantum leap with the "voyages of discovery" and the institution of New World slavery, and it reached its apogee with turn-of-the-century imperialism, when the proportion of the earth's surface controlled by European powers rose 67 per cent (in 1884) to 84.4 per cent (in 1914), a situation that began to be reversed only with the disintegration of the European colonial empires after World War II" see Harry Magdoff *Imperialism: From the Colonial Age to the Present* (Monthly Review Press, New York, 1978) at 108.

⁴ Ella Shohat and Robert Stam *Unthinking Eurocentrism* at 16.

⁵ See Peter C Mancal "The Age of Discovery" (The Johns Hopkins University Press, 1998) electronic document <http://muse.jhu.edu/journals/reviews_in_american_history/v026/26.1mancall.html> last visited on 12/12/2014.

⁶ "The word 'primitive' generally refers to someone or something less complex, or less advanced, than the person or thing to which it is being compared. It is conventionally defined in negative terms, as lacking in elements such as organization, refinement and technological accomplishment. In cultural terms this means a deficiency in those qualities that have been used historically in the West as identifications of civilization ..."

consideration. They were the 'savages' who stood between colonizers and the promised land, and were expected to either naturally disappear over time or to be assimilated into society.⁷ Colonisation as such, caused the disappearance of entire civilizations and the enormous loss of indigenous cultures. What went lost is not only the inheritance of entire civilizations, but the inheritance of all human beings. In their book, Mor and Sjoö stress how political invasion and cultural colonialism have been the major causes of the cultural regression and suppression of the last two thousands years:⁸

The invaders try to destroy the existing social forms, by force and punitive colonial practices, and attempt to impose their own cultural and religious patterns on the conquered. Culture is people's own vision of themselves in relation to the world, created by themselves through a blood-continuity of time and space. Political invasion, via cultural colonialism weakens the creative will of the conquered by destroying the people's coherent vision of themselves. Guns, police, and the invader's law help in this process; but imposition of alien cultural symbols and religious ideas are the most effective tools, in the long run, for obliterating or distorting a people's self-image

In the last few centuries, the world has apparently evolved into technological and capitalist societies: but at what cost? According to Sjoö and Mor, what today remains of the spirit, poetry and symbolic truth in this world "did not come from 'us'",⁹ but from those traditional cultures that have somehow managed to retain some of their spiritual tradition in the face of Western 'progress' and 'evolution'. Whether we like it or not, we have inherited a world that was built on oppression and slavery. The traumas from oppression have gone so deep inside the human psyche, indigenous and non (let's not forget that at some point in history we were all indigenous and we have all most likely been colonized by stronger powers),¹⁰ that not only do they take a long time to heal, but they have

(Rhodes, 1995); Chris Tilley, Webb Keane and others (eds) *Handbook of Material Culture* (SAGE Publishing, London & Thousand Oaks, 2006) at 268.

⁷ David R M Beck "The Myth of the Vanishing Race" electronic document

<<http://memory.loc.gov/ammem/award98/ienhtml/essay2.html>> last visited on 01/02/2012.

⁸ Monica Sjoö and Barbara Mor *The Great Cosmic Mother* (Harper & Row, San Francisco, 1987) at 24.

⁹ Supra at 85.

¹⁰ M Kohn "Colonialism" (2006).

affected everyone directly and indirectly ever since political and cultural colonization started.

Colonization, as such, is a recurrent historical phenomenon. Every event through human intervention that causes a cultural and political threat to another society is a form of colonization.¹¹ However, as commonly defined, ‘colonialism’ is the period of European expansion that started in the 16th century towards Asia, Africa, Oceania and Americas. When colonisers arrived in the new worlds they established colonies.¹² The Spanish conquest of the Americas initiated a theological, political and ethical debate about the legitimacy of the use of force to acquire or control new lands. This debate took place within the “framework of a religious discourse that legitimized military conquest as a way to facilitate the conversion and salvation of indigenous peoples”.¹³ Often, to justify the acquisition of foreign territories, new settlers claimed they had landed in *terrae nullius* inhabited by groups of savages¹⁴ who were not regrouped under a societal structure (as understood in Western culture) and, consequently, had no legal status. In his book *The Acquisition of Backward Territory in International Law*, Lindley explains that, in international law, *territorium nullius* includes uninhabited lands or “... lands inhabited by individuals who are not permanently united for political action” and “... lands which have been forfeited because they have not been occupied effectively”.¹⁵ Surely, such definition rested on the conviction of what constituted a social and political structure under European standards. It had nothing to do with the idea indigenous peoples had of a society.¹⁶ According to Brierly:¹⁷

¹¹ Colonialism (kə'ləʊniə.lɪzəm) (Government, Politics & Diplomacy) the policy and practice of a power in extending control over weaker peoples or areas. Also called: imperialism, see definition at <www.thefreedictionary.com/colonialism> last visited in January 2014.

¹² Supra footnote 1; see also Frederick Cooper *Colonialism in Question: Theory, Knowledge, History* (University of California Press, 2005) and Ania Loomba *Colonialism/Postcolonialism* (2nd ed, Routledge, New York, 2005).

¹³ See M Kohn “Colonialism” (2006).

¹⁴ “Civilization is that quality possessed by people with civil government; civil government is Europe’s kind of government; Indians did not have Europe’s kind of government; therefore Indians were not civilized. Uncivilized people live in wild anarchy; therefore Indians did not have any government at all. And therefore Europeans could not have been doing anything wrong – were in fact performing a noble mission – by bringing government and civilization to the poor savages” see Francis Jennings *The Invasion of America* (WW Norton, New York, 1975) at 127.

¹⁵ Sir MF Lindley *The Acquisition of Backward Territory in International Law* (Negro University Press, New York, 1969) at 80.

¹⁶ According to Keal “three points need to be made about *terra nullius*. First it is hard to say when the actual term first entered legal and diplomatic language. It was used widely in the nineteenth century but in earlier

... the doctrines of dispossession which emerged in the subsequent development of modern international law, particularly the *terra nullius* and 'discovery' ones, have had well-known adverse effects on indigenous peoples. ... Strictly speaking, in the seventeenth, eighteenth, and nineteenth centuries, the doctrine of 'discovery' gave to a discovering State of lands previously unknown to it, an inchoate title that could be perfected through effective occupation within a reasonable time.¹⁸

These newly created doctrines, at the time still unsupported by international law, de facto excluded indigenous peoples from European social structure leaving indigenous societies without any "entitlement to the rights Europeans normally accorded to each other".¹⁹ In Europe, it was the general belief that the populations of those lands were living without any pre-existing social or legal order and, as nomadic hunters, they could not claim any sovereignty over the land they 'temporally' occupied.²⁰ In this case, the right of Europeans to claim such lands was held to derive from an act of 'discovery' or actual 'occupation'. Lindley expressed his concern about whether the occupation of a territory confers a de facto sovereignty on the occupants. He argues that jurists often justify occupation on the sole basis of what legally constitutes a state; and because native peoples were not regarded as entities that constituted states, they were legally subjected to occupation and acquisition. Lindley's theory, not

times lands of the kind it was meant to describe were usually simply referred to as either 'uninhabited' or *vacuum domicillium*. Thus William Blackstone spoke of 'desert uninhabited countries' (*Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769, Vol. 1*) rather than *terra nullius*. Second, by the time Lindley was writing the concept of *terra nullius* had been widened to include lands that were in fact inhabited. It had been enlarged by international law to justify the acquisition of the territory occupied so-called 'backward' peoples who did not conform to European understandings of political society. Third, in the nineteenth century, especially during the 'Scramble of Africa', *terra nullius* was a reference not to whether territory was occupied by non-Europeans but, instead, another European state. At the time of the Scramble for Africa it was usual for European states to claim sovereignty over territory they did not actually occupy. For claims to be sustained against counter-claims from other European states the claimant had to 'effectively occupy' the territory in question within a reasonable time. *Terra nullius* in this sense served the role of international law in prescribing ways to avoid conflict between European States" see Paul Keal *European Conquest and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2003) at 52.

¹⁷ J L Brierly *The Law of Nations* (Oxford University Press, New York, 1960) at 154.

¹⁸ Brierly at 154.

¹⁹ Anthony J Connolly *Indigenous Rights* (Ashgate, Fernham, 2009) at 47.

²⁰ For further readings on the subject see Boyce Richardson *People of Terra Nullius* (University of Washington Press, Seattle, 1993).

only questions the nature of indigenous settlements in the new worlds, but also discusses the very core of what could be legally defined a 'state':²¹

Now to say that a country is open to Occupation when it is not under the sovereignty of a State, or is occupied by a savage nation, does not carry us far unless we are agreed upon a definition of the term 'State', or know the characteristics that are to distinguish savage from civilized peoples. No race is without organization of some kind, and if ... we regard as a State every society which performs the functions of war and the administration of justice, many peoples usually regarded as savage would form a State.

According to Secher,²² the distinction between a territory acquired by occupation/settlement, a territory acquired through treaty, and a territory acquired as a result of conquest was significant not only for the purpose of legitimising English rule in international law, but also for its consequences in English law. The international law of the eighteenth century recognised four ways of acquiring sovereignty over a new territory: by conquest, cession, occupation and annexation. Initially, the doctrine of *terra nullius* was applied to the acquisition of new territory which was uninhabited. Gradually, however, the doctrine was extended to justify acquisition of inhabited territories by occupation if the land was uncultivated or its Aboriginal inhabitants were not 'civilised' or not organised in a society that was united permanently for political action.²³ Today, the concept of *terra nullius* is generally considered racist (see

²¹ Lindley continues by saying that: "Even when the rule is put in terms of the States which are members of the Family of Nations or form the community of International Law, it is still not precise. The community within which International Law operates is not one with definite limits. ... Now the progress of ethnography has shown that the distinction between civilized and uncivilized is not one that can be drawn with accuracy in practice. The proper distinction is not between civilization and no civilization, but between one kind of civilization and another, or one stage of development and another. Many of the so-called 'savage' races – or ... 'natural' races – possess organized institutions of government, and it cannot be truly said that the territory inhabited by such races is not under any sovereignty. Such sovereignty as is exercised there may be of a crude and rudimentary kind, but, as long as there is some kind of authoritative control of a political nature which has not been assumed for some merely temporary purposes, such as war, so long as the people are under some permanent form of government, the territory should not, it would seem, be said to be unoccupied" see MF Lindley *The Acquisition and Government of Backward Territory in International Law* (Longmans, Green & Co. Ltd, London, 1926) at 19-20.

²² Ulla Secher *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing Ltd, Oxford, 2014).

²³ "The crucial point is that, although the doctrine of *terra nullius* is a well-established concept of international law, it is not a concept of the common law. Nevertheless, the doctrine has a common law counterpart in the 'desert and uncultivated' doctrine which classified inhabited land as uninhabited for the purpose of the doctrine of reception. The common law doctrine determining the law in force in a newly

paragraph 4 of the Preamble of the 2007 UN Declaration on the Rights of Indigenous Peoples).²⁴ In addition to that, and before the *Mabo (No 2)* case in (1992),²⁵ in 1975 the Advisory Opinion of the International Court of Justice in the *Western Sahara* case²⁶ had considered land agreements between indigenous peoples and states as 'derivative roots of title' rather than recognising original title obtained by occupation of terra nullius.²⁷

During his time, de Vitoria (1483-1546)²⁸ anticipated the liberal arguments that would eventually circulate in Europe during the seventeenth and eighteenth century on what power could be legitimately exercised by a state.²⁹

acquired territory depended upon the manner of its acquisition by the Crown" see Ulla Secher *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing Ltd, Oxford, 2014) at 29.

²⁴ "Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust" see UN Declaration on the Right of Indigenous Peoples electronic document <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

²⁵ *Mabo v Queensland [No 2]* [1992] 175 CLR 1 (*Mabo*) declared that *terra nullius* had never legally existed and that it had been wrongfully applied to Australia. The high court said that 'ultimate' title existed instead, and through that, native title could be claimed. Australian land law has developed from English land law and it was under those principles that Australia was settled. At common law all land is owned by the Crown which then deals with that land as it sees fit. The Queensland government reacted to the land rights claim by passing the *Queensland Coast Islands Declaratory Act 1985* (Qld) which said that the Torres Strait Islander rights and claims had been extinguished in 1879 when the islands came under the rule of the Queensland government. It was a futile move to stop the Meriam people's claim and in 1989 it was overruled as it contravened the *Racial Discrimination Act 1975* (Cth). The case then came to the High Court of Australia – the highest court in the country. In the High Court the Meriam people claimed continuous connection with their land. This was despite the fact it had been declared a possession of the New South Wales Colony in 1797 and then annexed by the Queensland government in 1879. The Queensland government said it had saved the Indigenous people of the Murray Islands from 'barbarism' and that the Crown had assumed all rights to the land in 1879. This assertion, however, was undermined by the fact that in 1913 the Queensland government had bought land from the Meriam people on which to build a police station. If the Crown (and therefore the State government) already owned the land then why would it have to buy some from the Indigenous inhabitants? The government had also established a land court in the early part of the 20th Century to preside over land disputes between the Meriam people." see electronic document <www.skwirk.com/p-c_s-14_u-120_t-330_c-1136/the-mabo-case/nsw/the-mabo-case/changing-rights-and-freedoms-aboriginal-people/land-rights-and-native-title> last visited on 15/12/2014. For further reading on the *Mabo* case, see Ulla Secher *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing Ltd, Oxford, 2014).

²⁶ See UN International Court of Justice electronic document <www.icj-cij.org/docket/index.php?sum=323&p1=3&p2=4&case=61&p3=5> last visited on 15/12/2014

²⁷ "The meaning of the words 'legal ties' has to be sought in the object and purpose of resolution 3292 (XXIX) of the United Nations General Assembly. It appears to the Court that they must be understood as referring to such legal ties as may affect the policy to be followed in the decolonization of Western Sahara. The Court cannot accept the view that the ties in question could be limited to ties established directly with the territory and without reference to the people who may be found in it' at supra.

²⁸ "Francisco de Vitoria ... raised in Burgos, was a Spanish Renaissance Roman Catholic philosopher, theologian and jurist, founder of the tradition in philosophy known as the School of Salamanca, noted especially for his contributions to the theory of just war and international law. He has in the past been described by some scholars as the 'father of international law', though contemporary academics have suggested that such a description is anachronistic, since the concept of international law did not truly develop until much later. Because of Vitoria's conception of a 'republic of the whole world' (*res publica totius orbis*) he recently has been labelled 'founder of global political philosophy'. Still, Vitoria is called one of the founders of international law along with Alberico Gentili and Hugo Grotius" electronic document

He rejected the theory of discovery and dismissed the idea of *terra nullius*.³⁰ De Vitoria claimed that the Indians were a civilized society that owned their land and, therefore, the indigenous territories were not open to acquisition by occupation.³¹ However, he also alleged that the Spanish had the right to resort to violence in case the Indians refused to engage with Spanish 'natural rights of trade and travel' (which included the right of priests and missionaries to travel to preach in the new lands).³² In such a case, colonizers would be justified to engage in war and dispossess 'infidels' of their lands. De Vitoria, in fact, believed that Commerce and Christianity were the foundation of Civilization. Hence, any discourse on indigenous peoples' territorial ownership would be subjected to the law of Commerce and Theology.

In his book *A Short Account of the Destruction of the Indies*, Las Casas (1484-1566), on the other hand, claimed that European colonization was brutal, unlawful and unjust.³³

<http://en.wikipedia.org/wiki/Francisco_de_Vitoria> last visited in January 2014; see also Thomas E Woods *How The Catholic Church Built Western Civilization* (Regnery Publishing, Washington, 2005); Anthony Pagden *Vitoria: Political Writings* (Cambridge University Press, Cambridge, 1991); Arthur Nussbaum *A concise history of the law of nations* (Macmillan, 1947).

²⁹ For further information on the subject, see Jérémié Gilbert *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Martinus Nijhoff, The Netherlands, 2012).

³⁰ "... or *Territorium Res Nullius*". The terminology "suggests that there is 'no prior presence' in conquered or 'discovered' territories" see Laurel Kearns and Catherine Keller (eds) *Ecospirit – Religions and Philosophies for the Earth* (Fordham University Press, New York, 2007) at 354. In the *Mabo* case, the Court stressed that "The Doctrine of Terra Nullius applied to 'uncultivated or desert lands'". The Court also concluded that this "unjust and discriminatory doctrine ... can no longer be accepted" electronic document <www.convictcreations.com/history/mabo.htm> last visited on 15/06/2011.

³¹ "Vitoria also dealt with the title to land being advanced by the Spaniards. He unequivocally rejected the concept of basing title on the status of the Spanish emperor as the 'Lord of the World'. He also stated that title could not be based merely on the Indians' rejection of the supremacy of the Pope. With reference to title based on claims that Spain was the first European nation to 'discover' the New World, Vitoria dismissed that proposition outright, saying the land 'discovered' already had an owner from a public and private point of view: the Indians. The most that discovery could do was to grant priority to the discovering state vis-a-vis other potential colonizers in pursuing trade with or land purchases from the indigenous nation. Likewise, papal grants could not substantiate title, but merely allocate priority rights among Catholic nations. In *Reflectiones*, Vitoria also outlined the nature of what constituted legitimate contact with the Indian nations. If the Indians were hostile after the Spaniards had demonstrated their 'friendly' intentions, only then were the Spaniards legitimately allowed to use force, and even then it had to be measured to inflict the least amount of damage. Vitoria concluded this work on a practical note, stating that commerce with the Indians was permitted, and that the Spanish Crown was bound by law and expediency to maintain its administration of the lands in question, as there were already many Aboriginal converts. The Spanish Crown accepted the validity of the principles articulated by Vitoria, although it perverted their intent through devising the *requirimientos*, in which the king's offer of friendship was read aloud in Spanish in a deserted locale. The failure of the Indians to accept the offer authorized the military to attack" see The Justice System and Aboriginal People, The Aboriginal Justice Implementation Commission electronic document <www.ajic.mb.ca/volumel/chapter5.html#4> last visited on 19/04/2012.

³² See Francisco de Vitoria *Vitoria: Political Writings* (Cambridge University Press, Cambridge, 1991) at 278-284.

³³ In the book Las Casas reported with great precision all the horrors and injustices perpetrated by colonisers in the Americas, see Bartolome' de Las Casas *A Short Account of the Destruction of the Indies*

Thus far, de Vitoria and the other scholars of the time, who were still sufficiently alien to indigenous traditions and believed in the inferiority of indigenous peoples, created the corpus of the legal theory and jargon that would eventually justify the conquest of indigenous territories regardless of their rights and cultural traditions. Even the scholars who, like de Vitoria, seemed the defenders of indigenous peoples, in reality, were just finding “more acceptable legal and moral justifications precisely for the subjugation of the Indian people”.³⁴ Contrary to the Christian scriptures, which advocate human compassion and tolerance towards all fellow human beings, invaders believed that their superiority as a race was enough to justify any ethical, religious and moral misbehaviour.³⁵ Colonialists’ political and religious powers enabled them to convince themselves that they were doing a favour to the ‘infidels’ by “lifting them up from Mother Earth – through whips, degradations, imprisonments, hunger, and slaughter’ so they could glimpse through tears into God’s kingdom”.³⁶ Followers of de Vitoria such as Emerich de Vattel (1714-67)³⁷ and R Phillimore (1810-85)³⁸ added to the argument that it was permissible to take possession of lands that were uninhabited or ownerless or in excess of what would be required by the people traditionally occupying them.³⁹

In his *Mare Liberum (The Law of the Seas)*, Hugo Grotius responds to Spanish conquests by arguing that it was plain heresy to believe that indigenous communities were “not masters of their own property” as well as to freely dispose of indigenous possessions on the basis of their non-Christian religious

(Penguin Classics, 1992); for further reading on the subject see also Tzvetan Todorov *The Conquest of America: The Question of the Other* (University of Oklahoma Press, Norman, 1999).

³⁴ Anthony J Connolly *Indigenous Rights* (Ashgate, Fernham, 2009) at 53.

³⁵ “The Institute of International Law at its session at Lausanne in 1888 adopted a declaration relative to the occupation of the territories. ... M de Martitz in submitting the draft, maintained that it was an exaggeration to speak of the sovereignty of savage or semi-barbarous peoples; that history shows that International Law does not make the validity of an occupation depend upon a cession of the sovereignty; that a treaty of cession can only be made by States recognizing International Law; that although it cannot be said that backwards peoples are outside the community of International Law they are not members of it; and that International law knows nothing of the ‘rights of independent tribes’” see MF Lindley *The Acquisition and Government of Backward Territory in International Law* at 16.

³⁶ Monica Sjoo and Barbara Mor *The Great Cosmic Mother* at 25.

³⁷ See Vattel’s biography at <www.encyclopedia.com/doc/1E1-Vattel-E.html>.

³⁸ Matthew C R Craven, Malgosia Fitzmaurice and other *Time, History and International Law* (Martinus Nijhoff, The Netherlands, 2011) at 68-70.

³⁹ Anthony J Connolly *Indigenous Rights* at 54.

beliefs.⁴⁰ Grotius, in fact, believed that the idea of ‘civilizing’ barbarians was just a pretext for gratuitous aggression that was hiding a “greedy longing for the property of another”.⁴¹ He argues that:⁴²

God was the founder and the ruler of the universe, and especially that being the father of all mankind, He had not separated human beings, as He had the rest of living things, into different species and various divisions, but had willed them to be of one race and to be known by one name; that furthermore He had given them the same origin, the same structural organism, the ability to look each other in the face, language too, and other means of communication, in order that they all might recognize their natural social bond and kinship.

Grotius’ vision was remarkably enlightened for his time. However, European legal and moral standards continued being applied to indigenous peoples without considering the cultural differences, distinct traditions and customary laws of the indigenous peoples they encountered.⁴³ Indeed, on the same note, Pufendorf (German jurist, political philosopher, economist, statesman and historian, 1632-1694) argued that Indians were the property holders of their land and “were under no obligation to receive visiting foreigners, as was the case with other nations”.⁴⁴ Fortunately, French, German and British philosophers like Montaigne, St Thomas Aquinas, Kant, Smith and Diderot⁴⁵ also refused to embrace colonial discriminatory ideology and courageously questioned the widespread moral values dictated by Eurocentrism.⁴⁶ In doing so, these

⁴⁰ Hugo Grotius *The Freedom of the Seas* (Betoche Books, Kitchener, 2000) at 15 electronic document <<http://socserv.mcmaster.ca/~econ/ugcm/3ll3/grotius/Seas.pdf>> last visited on 12/09/2011.

⁴¹ Supra at 16.

⁴² Supra at 7-8.

⁴³ See Anthony J Connolly *Indigenous Rights* at 602

⁴⁴ “Samuel Pufendorf, a contemporary of Grotius, criticized both Grotius and Vitoria in his renowned work, *De Jure Naturae et Gentium*. The Indians, Pufendorf argued, were under no obligation to receive visiting foreigners, as was the case with other nations. As the “property holders,” the Indians had the right to consider and determine the purpose and length of the visit, as well as the number of visitors. Even when the Indians granted the visitors certain trade and commercial privileges, they also had the right to revoke such privileges. It was untenable to suggest, Pufendorf argued, that the Indians were forced to welcome such visitors, especially when to do so would be at their own peril” see The Justice System and Aboriginal People, The Aboriginal Justice Implementation Commission electronic document <www.ajic.mb.ca/volume1/chapter5.html#4> last visited on 19/04/2012.

⁴⁵ See Biographies at the Internet Encyclopedia of Philosophy <www.iep.utm.edu/>.

⁴⁶ “Eurocentrism is the doctrine ‘focusing on European culture or history to the exclusion of a wider view of the world; implicitly regarding European culture as pre-eminent” see Oxford Dictionary at <www.oxforddictionaries.com/definition/english/Eurocentric> last visited on 11/12/2014; for further reading on the subject see also John M Hobson *The Eurocentric Conception of World Politics* (Cambridge

philosophers looked at the 'savage man' and saw in him the keeper of what was left on earth of man's integrity. As such, they were very critical of the barbarity of colonialism and challenged the idea that "Europeans had the obligation to 'civilize' the rest of the world".⁴⁷ In Diderot's mind (1713 - 1784), indigenous peoples had not much to benefit from European civilization apart from extreme brutality and discrimination. Diderot challenged the motives behind colonization, especially the right to commerce as discussed by de Vitoria in his writings. In fact, Diderot was against the idea (approved by de Vitoria) that it was fair to resort to war and conquer indigenous territories in those cases when native peoples resisted the incursions Spanish made in the name of trade and commerce. Not only did Diderot believe it was morally wrong to use commerce as an argument to justify violence and exploitation, he also considered the new traders as violent and dangerous guests.⁴⁸ The work of enlightenment anti-imperialists like Diderot and Kant already presented the tension between universalistic concepts, such as international human rights and the reality of societies which are based on multiculturalism. They recognised that even the most savage societies of the world shared the desire to create workable rules that would make their lives to flourish without creating more injustices and cruelties.⁴⁹

A contemporary of Diderot, J J Rousseau (1712-1778)⁵⁰ believed that the "'natural man' was free and connected to nature to a degree that was lost in the 'civil society'". Rousseau⁵¹ believed that the human race was meant to remain in the state of nature always; he thought that this state was the true 'youth' of the world, and that "all subsequent progress has been so many steps in appearance towards the improvement of the individual, but so many steps in reality towards the decrepitude of the species".

University Press, New York, 2012); see Ella Shohat and Robert Stam *Unthinking Eurocentrism* (Routledge, London and New York, 1994).

⁴⁷ See M Kohn "Colonialism" (2006).

⁴⁸ Denis Diderot *Histoire des Deux Indes* (Editions la Bibliothèque Digitale, 2013).

⁴⁹ "The struggle that all societies face to survive, adapt and develop is the common feature among humans that forms the basis of a cross-cultural moral understanding, one that Diderot contends European imperialists routinely violate" see Sankar Muthu *Enlightenment Against Empire* (Princeton University Press, Princeton, 2003) at 77; see also Julie K Ward and Tommy L Lott (eds) *Philosophers on Race: Critical Essays* (Blackwell, Malden, 2002).

⁵⁰ See Biography at <www.iep.utm.edu/rousseau/> last visited on 02/03/2016

⁵¹ Jean-Jacques Rousseau *A Discourse on Inequality* (Penguin Books, London, 1984) at 115.

Rousseau personally met some American Indians who visited Europe in the 18th century. These encounters convinced him of their uncorrupted rationality and goodness; something he considered missing in the 'modern' social order. In the 18th century, indigenous peoples were, in fact, often regarded as the holders of a primordial mind whose symbology and cosmology were still buried in the unconscious mind of the modern man. In expressing his sympathy for indigenous diversity, Rousseau automatically questioned the thought of philosophers like Hobbes, Grotius, Pufendorf, Mill, Locke⁵² who believed otherwise. He encouraged them to examine the foundations of modern society in depth and understand what 'the state of nature' was before lightly philosophizing about it. For Rousseau, the state of nature is something we all possess. It is where we all come from.⁵³

In his discussion of the state of nature, Thomas Hobbes (1588-1679)⁵⁴ had distinguished a '*jus naturale*' – a right of nature – that is an instinctual force present in all men, from a 'state of war' sometimes dormant (as in civil societies, except when they engage in civil wars and external wars), which is brutally awakened among savage people. In his discourse, the state of nature starts from indigenous peoples as an obvious antithesis of civil societies.⁵⁵ Hobbes' distinction between the state of nature and civil societies was unfortunately the "starting point in any Eurocentric discussions of government and politics",⁵⁶ as well as the moral and legal justification for all the practices employed by European colonizers with indigenous peoples. He did not see that the state of nature presented hierarchical structure and societal order of a different kind that reflected the needs and traditions of people who lived according to different customs.

⁵² Charles W Hendel *Jean-Jacques Rousseau: Moraliste* (The Hobbs-Merrill Company Inc, New York, 1934) at 64.

⁵³ Jean-Jacques Rousseau *Discourse on Inequality* (Penguin, London, 1984) at 78.

⁵⁴ See Biography and moral and philosophical thought at <www.iep.utm.edu/hobmoral/> last visited on 02/03/2016.

⁵⁵ "The liberty each man has to use his own power, as he will himself, for the preservation of his own nature, that is to say, his own life; and consequently, of doing anything which in his own judgment and reason he shall consider to be the aptest means thereto" see Thomas Hobbes *Leviathan; or the Matter, Forme, and Power of a Commonwealth Ecclesiastical and Civil*, (ed) CB Macpherson (Penguin Books, Baltimore, 1968) note 14, ch 12 at 246.

⁵⁶ Marie Battiste (ed) *Reclaiming Indigenous Voice and Vision* (UBC Press, Vancouver, 2000) at 17.

Closer to Rousseau's thought, John Locke (1632–1704)⁵⁷ postulated that indigenous peoples were grouped in nations and had governments that were coherent with their traditions. Indigenous peoples had remained indifferent to European political and social structures, for the simple reason that such structures could not be artificially implanted into societies that had not originated them. In other words, millennia of traditions could not be substituted overnight just because colonial powers wished so.⁵⁸ Locke was one of the first who recognised the legal personality of indigenous peoples. On this basis, he encouraged European settlers to build consensual relationships with native communities in the form of treaties and commercial agreements.⁵⁹

In the 17th century, the idea that the state of nature was common to all humankind as a place where life started for everyone was not new in philosophy. Back in the 5th century BC, Plato (428/27BC–348/47BC) in his *Dialogues* suggested that a close study of the 'state of nature' would be enlightening for all humankind, because it would show the fundamental nature of individuals, their beliefs and how race departed from its original type, diversifying itself into former civilizations.⁶⁰

There is no doubt that the intentions of the philosophers who argued in favour of the 'state of nature' were ethically and morally fair. However, in all of their writings there is a subtle sense of rejection. As if the state of nature is something dangerous from which it is necessary to take distance, as it is in the realm of the instincts, spiritual rapture and the freedom of the senses. The Christianised people could not conceive and embrace the freedom of the pagan ones. The very existence of indigenous peoples was a reminder of how life began, and this was not allowed for societies that evolved under the Christian belief.⁶¹ Consequently, any attempted description to define and defend the 'savage man' remained largely theoretical and aspirational; while no real attempt or desire to comprehend indigenous peoples' lives and traditions was ever made in the fear

⁵⁷ See Biography at <www.iep.utm.edu/locke/> last visited on 02/03/2016.

⁵⁸ For further readings on the subject see John Locke *Two Treaties of Government*, P Laslet (ed) (Cambridge University Press, Cambridge, 1970).

⁵⁹ Supra.

⁶⁰ Plato *Republic* (Macmillan & Co, London, 1910).

⁶¹ For further reading on the subject see Monica Sjoo and Barbara Mor *The Great Cosmic Mother*; Joseph Campbell *The Hero with a Thousand Faces* (3rd ed, New World Library, 2012); Mircea Eliade *The Sacred and the Profane: The nature of Religion* (Harcourt Australia, 1959).

that such a study would reveal something profoundly repressed in the 'modern man'. Moral, political and religious repression became the new credo against anything that could undermine Western thought; and Eurocentrism became the new philosophy of European empires. Under Eurocentric morality, indigenous peoples became wild, rootless, property-less and lawless.⁶² This was a problem which needed either reform or repression: or a repressed reform. Indeed, such strategy did not come without costs; from a reality of religious and democratic privilege, Europeans needed to dehumanize indigenous peoples to justify their racist aggression and moral repression.

This moral strategy is not new in the history of humankind. Already during Medieval times, the secular power (that created the Inquisition for the purpose) engaged in a campaign of power through repression and in four centuries killed, burned and wiped out nearly eight millions of 'infidels', including elders, women and children whose only crime was to hold true to the religion of the Earth and its traditions.⁶³ Indeed, indigenous peoples were representing ethnic groups of people who were indulging in the religion of the earth and had different spiritual creeds. As already happened before, in the 16th century, the great design to 'export' civilization therefore resulted in four hundred years of colonialism around the Earth, which is today rightly considered 'a process of conscious choice supported by manipulated facts' on the part of the colonizers who invented demons, where none actually existed, to justify atrocious acts.⁶⁴ As Marie Battiste explains,⁶⁵ those "400 years have had tragic consequences for Indigenous peoples. The consequences are more than mere conquest or the exercise of tyrannical power, slavery, and genocide; they go to the forced

⁶² "The secular European worldview affixes to the idea of race three correlates, which together underlie racism. (1) differences based on race are fundamental, intractable, and uttering indicative of superiority and inferiority; (2) these differences exclude brown people from the domain of knowing, reason, equality, and freedom ...; and (3) through taking identity against construction of 'Indians', Europeans and colonialists become bound in their own being by the terms by which they oppress others'. Point (1) and (2) see Jean-Jacques Rousseau *The Social Contract and Discourses* (Dent, London, 1986) at 186; Douglas B Davis *The Problem of Slavery in Western Culture* (Cornell University Press, Ithaca, 1966) at 114-15; John Locke "The Second Treatise of Government" in *Two Treatises of Government*, Peter Laslett (ed) (Cambridge University Press, Cambridge, 1970) at 325-26; for point (3) see Georg Wilhelm Friedrich Hegel *Phenomenology of Spirit* (Clarendon Press, Oxford, 1977) at 19.

⁶³ See Monica Sjoo and Barbara Mor *The Great Cosmic Mother*; Michael Baigent and Richard Leigh *The Inquisition* (Penguin, London, 2000).

⁶⁴ Marie Battiste (1986) "Micmac Literacy and Cognitive Assimilation" in J Barman, Y Hébert and D McCaskill (eds) *Indian Education in Canada: The Legacy* (UBC Press, Vancouver, 1986); Lise Noel *Intolerance: A General Survey* (McGill-Queen's University Press, Montreal, 1994) at 100.

⁶⁵ Supra at 100.

cognitive extinction". In the case of colonization, a historical record of the facts is not enough to explain the consequences that indigenous peoples are still facing today. The scars of such programmed dominion – like any other forced dominion – is enormous. Referring to Canadian Aboriginal people, Leroy Little Bear, affirms that.⁶⁶

... colonization created a fragmentary worldview By force, terror, and educational policy, [colonization] attempted to destroy the Aboriginal worldview. ... They no longer had an Aboriginal worldview, nor did they adopt a Eurocentric worldview. Their consciousness became a random puzzle, a jigsaw puzzle that each person has to attempt to understand.

Similar words are used by Erica-Irene Daes,⁶⁷ Chair of the United Nations Working Group on Indigenous Populations between 1984–2001. In her brilliant Prologue to Battiste's book, *Reclaiming Indigenous Voice and Vision*, she gives an accurate account of the shared traumatic effects that colonialism had on indigenous peoples worldwide.⁶⁸

The experience of oppression is spiritual death. It is about the destruction of our inborn spiritual faith in the importance of individuality and ... in the value of trying to stay alive. Victims of oppression not only lose interest in self-preservation, but also find it difficult to maintain their relationships as parents, friends, and neighbours. ... Isolation is an important tool, and a devastating result, of colonization. A fundamental weapon used by most colonizers against colonized peoples is to isolate the colonized from all outside sources of information and knowledge – and then to bombard them with propaganda carefully aimed at convincing them that they are backward, ignorant, weak, insignificant, and very, very fortunate to have been colonized. This strategy of

⁶⁶ Leroy Little Bear "Jagged Worldviews Colliding" in Marie Battiste *Reclaiming Indigenous Voice and Vision* (UBC Press, Vancouver, 2000) at 84.

⁶⁷ Professor Dr Erica-Irene Daes is an academic, diplomat, and United Nations expert. She is the founding Chairperson and Special Rapporteur of the United Nations Working Group on Indigenous Populations (1984–2001), during which time she promoted the cause of the world's indigenous peoples and authored many United Nations reports on Indigenous rights issues. She also served as a member of the United Nations Subcommission on the Promotion and Protection of Human Rights, and was a driving force behind the negotiations and creation of the United Nations Declaration on the Rights of Indigenous Peoples.

⁶⁸ Marie Battiste *Reclaiming Indigenous Voice and Vision* (UBC Press, Vancouver, 2000) at Introduction.

colonialism is designed to break down any resistance by persuading the colonized people that not only are they powerless to resist, but they would also be naïve to attempt to do so. It aims to inculcate the colonized people with the idea that they are out of step with the rest of the world; that they have no friends; and that their feelings of resentment and resistance are foolish and, far from being justified, simply prove just how savage and ignorant they must be. ... one of the most destructive of the shared personal experiences of colonized peoples around the world is intellectual and spiritual loneliness. From this loneliness comes a lack of self-confidence, a fear of action, and a tendency to believe that the ravages and pain of colonization are somehow deserved. Thus, the victims of colonization begin, in certain cases, to blame themselves for all the pain that they have suffered.

Undoubtedly, such repressive practices were not new to human thought. Repression and destruction are the best strategies to erase difference. No later than the 17th and 18th centuries, thinkers of the Enlightenment movement (1650s-1776), such as Hegel, Hume, Descartes,⁶⁹ etc, had already decided to cut indigenous peoples out of the evolutionary process. They discredited indigenous peoples on the sole basis of their primitiveness and mental inferiority, which, according to them, lacked any awareness of the concept of human freedom. Later in the 19th century, in his study on nature and evolution, Darwin himself regarded indigenous peoples as inferior. In his *Descent of Man* (1871)⁷⁰ he strongly asserted that the gulf between savages and civilized humans is almost unbridgeable. From this obvious assumption, he believed that primitive societies were destined to disappear from the face of the earth as the natural course of any evolutionary process. They would be substituted by people fitter and stronger.

⁶⁹ See Biographies at the Internet Encyclopedia of Philosophy <www.iep.utm.edu/>.

⁷⁰ "He who has seen a savage in his native land will not feel much shame if forced to acknowledge that the blood of some more humble creature flows in his veins" see Charles Darwin *The Descent of Man* (Prometheus Books, New York, 1998) at 643.

At some future period, not very distant as measured by centuries, the civilized races of man will almost certainly exterminate, and replace the savage races throughout the world.⁷¹

It is interesting to note, however, that Enlightenment philosophers made a few mistakes of evaluation. They, who had ontologically separated themselves from the atavist traditions of the world, naively believed they could comprehend the secrets of nature ‘through reason and science’. In their minds “the laws of nature governing the globe were ‘immutable’ and ‘progressive’ interpreted in the light of a presiding divine design”.⁷² Sitting on the bedrock of their self-asserted superiority, Western philosophers, religious and political leaders left no space for anything that could be understood and conceived by a non-Western intellect. In his book, *On the Origin of the Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*, Darwin postulated that only the fittest organisms in the struggle for survival are able to prevail long enough to pass their superior traits to future generations and, in so doing, guarantee the survival of that species. This nihilistic belief, today known as Social Darwinism,⁷³ found many followers such as Herbert Spencer, Joseph A Gabineau, John W Burgess and Theodore Roosevelt to name a few. The philosophy of social Darwinism was used to encourage racial discrimination, and also to justify all different inequitable socioeconomic relationships⁷⁴ existing in society. The idea was that from an evolutionary and ontological point of view, the rich and wealthy are indeed different from the poor. Power, science and religion say so, so it must be true. Consequently, the philosophical credo behind Social Darwinism promoted and justified imperial expansion and brutal colonization as reflective of models of Natural Law. Eurocentric models regarded European

⁷¹ Supra at 167-168.

⁷² Susan Greenwood *The Nature of Magic – An Anthropology of Consciousness* (Berg, New York, 2005) at 41.

⁷³ “Social Darwinism, the theory that persons, groups, and races are subject to the same laws of natural selection as Charles Darwin had perceived in plants and animals in nature. According to the theory, which was popular in the late 19th and early 20th centuries, the weak were diminished and their cultures delimited, while the strong grew in power and in cultural influence over the weak. Social Darwinists held that the life of humans in society was a struggle for existence ruled by ‘survival of the fittest’, a phrase proposed by the British philosopher and scientist Herbert Spencer” see electronic document at <www.britannica.com/EBchecked/topic/551058/social-Darwinism> last visited on 11/12/2014.

⁷⁴ For further details see Anthony J Hall *Earth Into Property – Colonization, Decolonization, and Capitalism* (McGill-Queen’s University Press, London, 2010) at 528.

settlers as the strongest and fittest of the species and, therefore, the only ones that were rightly entitled to reign over the world. The fact that such superiority was not necessarily based on moral, scientific and realistic rationales, but on the sole superiority of modern weaponry engineering, was dismissed or ignored. Darwin celebrated the importance of circumstances to define and decide who is to survive in an unwelcoming world. He judged human strength on the basis of how everyone copes and reacts to every circumstance. However, as pointed out by Nietzsche,⁷⁵ “the influence of ‘external circumstances’ is overestimated by Darwin to a ridiculous extent: the essential thing in the life process is precisely the tremendous shaping, form-creating force working from within which *utilizes* and *exploits* ‘external circumstances’”.

On the opposite side of the spectrum of the study on evolution, the anthropologist Claude Levi-Strauss (1908-2009)⁷⁶, today rightly considered the father of modern anthropology, argued that the mind of indigenous peoples had the same structure as the one of the so called ‘civilized men’, and that the human characteristics of ‘primitive’ societies are the same as those found in Western societies.⁷⁷ On the same note, Franz Boas,⁷⁸ who is considered the ‘father of relativism’, firmly rejected any Eurocentric theory based on superiority, and stressed that no researcher should project his/her Western values into any study on culture.⁷⁹ Every culture, in fact, should be understood and described in its own idiosyncratic terms and language, regardless of its complexity⁸⁰ or pretended righteousness. Culture, as such, is a very complex phenomena that cannot be reduced or circumscribed to the ontological beliefs of the few, no matter how righteous these few believe themselves to be.

Indeed, as often happens in human history in arguments of any kind, the winning theory is the one that better suits the élite in power. In total coherence with

⁷⁵ Friederich Nietzsche *The Will To Power* (Random House, New York, 1967) at 344.

⁷⁶ See Biography at <www.britannica.com/biography/Claude-Levi-Strauss> last visited on 02/03/2016.

⁷⁷ For further information on the topic see Claude Levi-Strauss *Tristes Tropiques* (Jonathan Cape Ltd, London, 1973).

⁷⁸ See Biography at <www.biography.com/people/franz-boas-9216786> last visited on 02/03/2016.

⁷⁹ See Franz Boas *Race Language and Culture* (The Free Press, New York, 1940), and *Anthropology and Modern Life* (The Norton Library & Co, New York, 1962).

⁸⁰ Yvonne M Donders *Towards a Right to Cultural Identity?* (Intersentia, Antwerpen-Oxford-New York, 2002) at 27.

such manmade phenomena, the ‘good intentions’ of researchers like Levi-Strauss and Boas, who stressed the uniqueness of the cultural and spiritual value of native peoples, remained strategically outside any discourse on equality; where ‘equality’ was obviously understood in Western terms. It is not surprising that, until recently, indigenous peoples have been stigmatised as alien entities whose survival was not a matter of concern for developed societies. In this light, indigenous communities were recognised as possessing no human and proprietary rights over their land, traditions and cultural heritage. In their incessant hunt for new lands and resources to exploit, states created legislation that would justify the expropriation of the territories traditionally inhabited by indigenous peoples. This happened regardless of any pre-existing native title over the land acknowledged during the ratification of treaties and agreements. It was only in the 19th century, and following the growth in the United States and Canada of national and international organizations for the protection of indigenous peoples’ land rights, that the legal notion of ‘Aboriginal title’ was finally discussed. While such discussions acknowledged that exclusive use and occupancy of land from time immemorial de facto gives rise to aboriginal title, on the other hand, such title, in importance, will always be outplayed by the Sovereignty of the State. The issues surrounding aboriginal title are the consequences of the illicit assumption that, over the years, States, when arbitrarily deemed necessary, can use their power to extinguish such title and enforce their power to remove indigenous peoples from their traditional lands in the name of the integrity of the state (or under any other ‘valid’ excuse). Even if states over the years have come around, and established legislation recognising and reaffirming aboriginal and treaty rights, many Courts in the United States, Canada and Australia (to name a few) have decided that aboriginal rights and aboriginal title to land are “not absolute but may be ‘infringed’ by the federal or provincial governments when the infringement is ‘justified’ by the needs of the larger society”.⁸¹

⁸¹ See Erica-Irene Daes *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities*, Commission on Human Rights, Commission on Human Rights, Economic and Social Council, (2001) UN Doc E/CN.4/Sub.2/2001/21 at 16.

In the *Mabo* case,⁸² the High Court of Australia finally dismissed the validity of the doctrine of *terra nullius*. However, at the same time, it legitimated the extinguishment of the native title by “legislation, by alienation of the land, by the Crown or by the appropriation of the land by the Crown in a manner inconsistent with the continuation of native title”.⁸³

The Eurocentric belief that indigenous rights are subjected to the State’s well-being (on the basis of what any State believes its well-being to be) has resulted in the creation of legislation which, inter alia, legitimize the expropriation of native lands and resources. Consequently, the loss of the indigenous culture that was traditionally connected to the lands expropriated has been enormous. Unrecorded histories and sacred and secret traditions that guaranteed indigenous survival were forgotten.⁸⁴ And yet, today, after years of constant discrimination, indigenous peoples are reclaiming their voices and their place in the societies they inhabit.⁸⁵ They are linked to the society they are part of and, at the same time, they are linked together with other indigenous groups by the experience of similarly oppressive practices that European colonizers performed with efficacy in foreign lands; and these very practices are what makes indigenous peoples seek workable common collective solutions to safeguard their traditions and secret knowledge.⁸⁶

⁸² *Mabo v Queensland* (No 2) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).

⁸³ At 16; see also the Native Title Amendment Bill 1998 at <www.comlaw.gov.au/Details/C2004A00354> last visited on 13/06/2012; see also Ulla Secher *Aboriginal Customary Law: A Source of Common Law Title to Land*.

⁸⁴ For more information see Eugene Linden “Lost Tribes, Lost Knowledge” electronic document <www.ciesin.org/docs/002-268/002-268.html> last visited on 03/02/2012.

⁸⁵ “Many [anthropologists] reject relativism in favour of an evolutionary analysis by observing that societies do indeed change their customs by developing more humane habits in conjunction with the growth of their economic, technological, and scientific capabilities. They emphasize the common denominators among cultures, suggesting that it is proper to speak of the common humanity of people as the basis for cross-cultural morality and ethics that are not completely culturally relative” see Elizabeth M Zechenter “In the Name of Culture: Cultural Relativism and the Abuse of the Individual” (1997) 53 *Journal of Anthropological Research* 319 at 326.

⁸⁶ “We never knew that indigenous people were so global, but we find that we have the same common problems and the same kind of world-view in most cases. That’s why, in the drafting of the UN Draft Declaration on the Rights of Indigenous Peoples, it was easy for indigenous people to come to agreement on what our rights are. It’s easy for us to agree” see Taiaiake Alfred *Peace, Power, Righteousness: An Indigenous Manifesto*, (Oxford University Press, Don Mills-Ontario, 1999) at 110-111.

Hence, before going onto exploring indigenous cultures, it is important to introduce who indigenous peoples are today: what characterize and unite them in their quest to see their cultures safeguarded.⁸⁷

1.2 - Who Indigenous Peoples Are Today.

International law considers indigenous peoples as the descendants of the original inhabitants of those territories taken over by aliens through conquest or settlement.⁸⁸ Although governments still struggle to understand and codify indigenous peoples' traditions and cultures, and consequently, to adopt the legal obligations that would safeguard and respect these traditions, in general terms, indigenous peoples constitute distinct groups of people united by common ancestry and heritage. According to the United Nations Permanent Forum for Indigenous Issues (UNPFII):⁸⁹

... they are the descendants of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived. The new arrivals later became dominant through conquest, occupation, settlement or other means.

It is common knowledge that there is no universally accepted definition of indigenous peoples. General practice suggests that the definition created in 1986 by the UN Special Rapporteur Martinez Cobo is still the most appropriate, although incomplete, that is generally used. In Cobo's words:⁹⁰

⁸⁷ For further reading on the topic, see also the excellent works of Professors Mick Dodson, Larissa Behrendt, Marcia Langton, Martin Nakata and Megan Davis.

⁸⁸ Mr José Martínez Cobo "Study of the Problem of Discrimination Against Indigenous Populations: Final report" E/CN.4/Sub.2/1982/2/Add.6 (UN Economic and Social Council, June 1982) electronic document <http://www.un.org/esa/socdev/unpfii/documents/MCS_v_en.pdf> last visited on 16/02/2017

⁸⁹ United Nations Permanent Forum on indigenous Issues "Who are Indigenous Peoples?" electronic document <www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> last visited on 04/12/2014.

⁹⁰ Cobo's definition follows as: "The historical continuity may consist of the continuation for an extended period reaching into the present, of one or more of the following factors: a) occupation of ancestral lands or at least of part of them; b) common ancestry with the original occupants of these lands; c) culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc); d) language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); e) residence in certain parts of the country, or in certain regions of the world; f) other relevant factors" see José Martínez Cobo *Study of the Problem of*

Indigenous communities, peoples and nations are those which, having an historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own patterns, social institutions and legal systems.

According to Cobo's Report, the 'historical continuity' may 'consist of continuation, for an extended period reaching into present'; where 'historical continuity' may be interpreted as:

- occupation of ancestral lands, or at least of part of them;
- common ancestry with the original occupants of these lands;
- culture in general, or in specific manifestations (eg religion, living under tribal system, membership of an indigenous community etc);
- language; and
- residence in certain parts of the country, or regions of the world.⁹¹

The Report stresses that such a definition is man-made and, for real effectiveness, indigenous peoples should be left free to define themselves in accordance with their cultural traditions;⁹² or to decide if such a definition is fair or necessary. The common feature that clearly defines indigenous peoples is the historical continuity they have with the pre-invasion and pre-colonial societies that developed on their traditional territories. While agreeing with Cobo that there is still ambiguity on the definition of indigenous peoples in international law, the late Ian Brownlie emphasised⁹³ that "general or customary international

Discrimination against Indigenous Populations UN Doc E/CN.4/Sub.2/1986/7/Add.4 at para 379-380 electronic document <www.un.org/esa/socdev/unpfii/documents/MCS_xvii_en.pdf> last visited on 06/12/2014.

⁹¹ See UN Doc E/CN.4/Sub.2/1986/7/Add.4 at para 378-380.

⁹² Douglas E Sanders "Indigenous Peoples: Issues of Definition" (1999) 8 *International Journal of Cultural Property* 4 at 6.

⁹³ Ian Brownlie Edited by F M Brookfield *Treaties and Indigenous Peoples* (Clarendon Press, Oxford, 1992) at 61.

law does not prevent any rules or principles concerning indigenous peoples as such". He meant that international law is relevant to the affairs of indigenous peoples. Human rights standards (including the principle of non-discrimination and group rights) apply to indigenous peoples too.⁹⁴ Brownlie stresses that, even if there are no norms of general international law expressly designed to protect the interests of indigenous peoples, today there are two general multilateral Conventions and one Declaration dealing specifically with indigenous peoples: the International Labour Organization Convention (ILO) No. 107 concerning the Protection and Integration of Indigenous and other Tribal Populations in Independent Countries (1957)⁹⁵ and its revised version, Indigenous and Tribal Peoples Convention ILO No 169 (1989)⁹⁶ along with the UN Declaration on the Rights of Indigenous Peoples (2007) which sets standards that apply to all nations. Although ILO No 107 uses a slightly obsolete and paternalistic language, the provisions of Article 3 clearly state the necessity to introduce 'special measures' for the safeguard of indigenous peoples in those countries where the general laws fail to guarantee the enjoyment of equal rights of indigenous peoples.⁹⁷ For this reason, in 1989, the International Labour Organization Convention No 169 accepted a broader historical requirement for indigenous peoples to be considered as such. These new parameters are included in Article 1 (1) as:⁹⁸

⁹⁴ "This follows as a matter of general principle, but it is also borne out by the case-load of such institutions as the UN Human Rights Committee related to the Civil and Political Rights Covenant, and the Inter-American Commission of Human Rights. ... In the same way, the International Convention on the Elimination of All Forms of Racial Discrimination provides protection for the rights of indigenous peoples" see *supra* at 62.

⁹⁵ C 107 - Indigenous and Tribal Populations Convention, 1957 (No 107) Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Entry into force: 02 Jun 1959)
<www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107> last visited on 10/07/2015.

⁹⁶ C 169 - Indigenous and Tribal Peoples Convention, 1989 (No 169) Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Entry into force: 05 Sep 1991)
<www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C169> last visited on 10/07/2015.

⁹⁷ ILO No 107 Article 3.1: "So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations. 2. Care shall be taken to ensure that such special measures of protection: (a) are not used as a means of creating or prolonging a state of segregation; and (b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary. 3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures of protection".

⁹⁸ See Art 1.1 ILO Convention on Indigenous and Tribal Peoples No 169 (1989).

(a) tribal peoples in independent countries whose social, cultural and economic conditions and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social economic, cultural and economic institutions.

In its wording, however, ILO Convention 169 played unfairly: on one side, it referred to indigenous as ‘peoples’, and on the other, as suggested by James Anaya, the Convention, blocked under the spell of states, specifies that the term ‘peoples’ is understood to have “no implication as regards the right to self-determination as understood in international law”.⁹⁹ The ILO’s Committee added that specification to ensure that any indigenous peoples claiming their right to self-determination could not point to ILO 169 as endorsing the application of common article 1 of the International Covenant on Civil and Political Rights (ICCPR, 1966),¹⁰⁰ and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).¹⁰¹ In 2007 the Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁰² rectified the limitations of ILO 107 and 169 and stated that indigenous peoples are vested with the right to self-determination,

⁹⁹ James Anaya *Indigenous Peoples in International Law* (Oxford University Press, New York, 2004) at 60.

¹⁰⁰ International Covenant on Civil and Political Rights - Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49 at <www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> last visited on 10/07/2015.

¹⁰¹ Article 1: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations”. The International Covenant on Economic, Social and Cultural Rights - Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27 at <www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> last visited on 10/07/2015.

¹⁰² Article 3: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

which includes their right to define themselves according to their traditions and cultures.¹⁰³ It means that indigenous peoples must be considered as ‘peoples’ whose affiliation to a specific ethnic group has characteristics historically and culturally more complex than the ones recognised by Cobo in the 1980s.¹⁰⁴ It is accurate to say that, while in the 1980s and 1990s Cobo’s definition was generally considered accurate, today it is regarded as controversial and limited in scope. According to Brownlie, in fact, while on one side the definition does not take into account the peculiar ‘vulnerabilities’ shared by many indigenous populations confronted with the hegemonic exploitation of capitalist societies, on the other, Cobo’s reductive approach limits indigenous peoples to a non-dominant part of the society whose needs and expectations must be considered in this context.¹⁰⁵ In Brownlie’s view, to traditionally consider most of the indigenous peoples on the sole basis of their numerical inferiority within state’s borders is not only unfair and morally unethical, but is also “unhelpful and inimical to the application of legal principles to establish equity”.¹⁰⁶ The number of the components of a group cannot be used to jeopardize the rights of the group. This is not only morally wrong, but it goes against specific human rights regulations created to prevent such cases of discrimination.¹⁰⁷

¹⁰³ “The right of self-determination is a keystone in the United Nations human rights system and has been granted a privileged place in two major international treaties, namely the International Covenant on Civil and Political Rights ... and the International Covenant on Economic, Social and Cultural Rights - 1. Article 1 of both Covenants clearly establishes the right of all peoples to self-determination, including their right to freely determine their political status and freely pursue their economic, social and cultural development, and the corresponding obligation of States parties to respect and promote the realization of that right” see Anna Batalla The Right of self-determination – ICCPR and the jurisprudence of the Human Rights Committee Symposium on “The Right to Self-Determination in International Law” Organised by Unrepresented Nations and Peoples Organization (UNPO), Khmers Kampuchea-Krom Federation (KKF), Hawai’i Institute for Human Rights (HIHR), (2006) at 1.

¹⁰⁴ The Preamble of UNDRIP recognised that “all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust” and it is convinced that “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs” and acknowledges that ‘the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development ...’ Such rights were not yet as fully recognised to indigenous peoples at the time of the Cobo’s Report.

¹⁰⁵ Ian Brownlie Edited by F M Brookfield *Treaties and Indigenous Peoples* (Oxford, Clarendon Press, 1992) at 60.

¹⁰⁶ *Supra* at 60.

¹⁰⁷ See chapter 4 on indigenous peoples and international law.

Following a new wave of indigenous revival, in the 1990s, the World Bank manifested a timid, growing concern for the 'vulnerability' of indigenous cultures. In 1991, the World Bank re-emphasized the importance of protecting indigenous peoples, and stressed that, while indigenous communities worldwide present similar traits that can be rightly considered common to every holistic group who live close to the land and of the land, at the same time, it is unquestionably demonstrated that such communities present unique cultural features that differ from region to region. To that end, the World Bank intervened in the narrow definition left by Cobo and expanded it to include the 'distinctiveness' of indigenous societies.

The terms 'indigenous peoples', 'indigenous ethnic minorities', tribal groups', and 'scheduled tribes' describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process.¹⁰⁸

The World Bank's intervention was mostly needed; however, the road ahead seemed, at that time, still very long. In 2005, the World Bank presented the Operational Programme 4.10, which states that:¹⁰⁹

The Bank recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease.

The Bank also stressed that:¹¹⁰

¹⁰⁸ World Bank Operational Directive 4.20 (September, 1991) electronic document <www.ifc.org/wps/wcm/connect/835cc50048855270ab94fb6a6515bb18/OD420_IndigenousPeoples.pdf?MOD=AJPERES> last visited on 16/02/2017.

¹⁰⁹ The World Bank *Operational Manual* electronic document <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f89d5.pdf>> last visited on 16/02/2017.

¹¹⁰ 4. "For purposes of this policy, the term 'Indigenous Peoples' is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees:

Because of the varied and changing contexts in which Indigenous Peoples live and because there is no universally accepted definition of 'Indigenous Peoples', this policy does not define the term. Indigenous Peoples may be referred to in different countries by such terms as 'indigenous ethnic minorities', 'aboriginals', 'hill tribes', 'minority nationalities', 'scheduled tribes', or 'tribal groups'.

In 1998 Benedict Kingsbury¹¹¹ gathered together all pre-existing definitions of indigenous peoples and created a more flexible and constructive version that would better reflect the evolution of national and international legislation. As essential requirements he recognised: 'the self-identification as a distinct ethnic group; historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation; long connection with the region and the wish to retain a distinct identity.'¹¹² As relevant indicia, he suggested indigenous peoples':¹¹³

- non dominance in the national (or regional) society;
- close cultural affinity with a particular area of land or territories;
- historical continuity (especially by descent) with prior occupants of land in the region;
- socioeconomic and sociocultural differences from the ambient population;
- distinctive objective characteristics such as language, race, and material or spiritual culture; and
- their being regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements.

(a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (d) an indigenous language, often different from the official language of the country or region. A group that has lost 'collective attachment to geographically distinct habitats or ancestral territories in the project area'; (paragraph 4 (b)) because of forced severance remains eligible for coverage under this policy. Ascertaining whether a particular group is considered as 'Indigenous Peoples' for the purpose of this policy may require a technical judgment" see electronic document supra.

¹¹¹ See Benedict Kingsbury "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 *The American Journal of International Law* 414-457.

¹¹² Supra at 414-457.

¹¹³ Benedict Kingsbury quoted in Douglas E Sanders "Indigenous Peoples: Issues of Definition" (1999) 8 *International Journal of Cultural Property* 4 at 11.

Indeed, the issue of ‘who indigenous peoples are’, has been hotly debated over the years, nationally and internationally, and nearly always without the direct consultation of the indigenous peoples themselves. Professor James Anaya (UN Special Rapporteur on the Rights of Indigenous Peoples, May 2008-May 2014) explains that it is more important to allow indigenous peoples to qualify themselves as such, than to abstractly create an ad hoc definition that explains which group qualify as ‘indigenous’. According to Anaya, the matter of definition should be centred on “shared experiences, common aspirations, and an identified scope of programmatic action” alongside with the “repeatedly claimed right of self-identification”.¹¹⁴ On the same lines, UNPFII recognises the importance of indigenous self-identification and confirms that indigenous peoples present distinctive features that are different from the society at large and therefore an official definition of indigenous peoples has not been adopted by any UN-system body. Instead the system has developed a modern understanding of the term ‘indigenous peoples’ based on the following criteria:

- self-identification as indigenous peoples at the individual level and accepted by the community as their member;
- historical continuity with pre-colonial and/or pre-settler societies;
- strong link to territories and surrounding natural resources;
- distinct social, economic or political systems;
- distinct language, culture and beliefs;
- form non-dominant groups of society (apart from exceptions eg Taonga); and
- resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.¹¹⁵

The Forum carries on by explaining that the generic term ‘indigenous’ has prevailed over the years because indigenous peoples present important similarities all over the globe. However, the term cannot be always used

¹¹⁴ James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 31-32.

¹¹⁵ See UN Permanent Forum on Indigenous Issues electronic document <www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> last visited on 02/11/2014.

generally and every community should be granted the right to address themselves in respect of their traditions and heritage.¹¹⁶

Recently the African Commission on Human and Peoples' Rights (ACHPR) has also stressed the importance of acknowledging and protecting the 'special' attachment that indigenous peoples have with their traditional lands. In the case of indigenous peoples, sacred and spiritual locations are essential markers of identifications. The ACHPR Advisory Opinion (2007) reconfirms such fundamental bond between indigenous peoples and their traditional lands and considers a criteria of identification:¹¹⁷

- a) self-identification;
- b) a special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and
- c) a state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.

¹¹⁶ "... the term 'indigenous' has prevailed as a generic term for many years. In some countries, there may be preference for other terms including tribes, first peoples/nations, aboriginals, ethnic groups, adivasi, janajati. Occupational and geographical terms like hunter-gatherers, nomads, peasants, hill people, etc., also exist and for all practical purposes can be used interchangeably with 'indigenous peoples'. In many cases, the notion of being termed 'indigenous' has negative connotations and some people may choose not to reveal or define their origin. Others must respect such choices, while at the same time working against the discrimination of indigenous peoples. Indigenous peoples are the holders of unique languages, knowledge systems and beliefs and possess invaluable knowledge of practices for the sustainable management of natural resources. They have a special relation to and use of their traditional land. Their ancestral land has a fundamental importance for their collective physical and cultural survival as peoples. Indigenous peoples hold their own diverse concepts of development, based on their traditional values, visions, needs and priorities'. They have much in common with other neglected segments of societies, i.e. lack of political representation and participation, economic marginalization and poverty, lack of access to social services and discrimination. Despite their cultural differences, the diverse indigenous peoples share common problems also related to the protection of their rights. They strive for recognition of their identities, their ways of life and their right to traditional lands, territories" see United Nations Permanent Forum on Indigenous Issues "Who Are Indigenous Peoples?" electronic document <www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> last visited on 04/12/2014.

¹¹⁷ However according to the ACHPR Advisory Opinion (2007) "in Africa, the term indigenous populations does not mean « first inhabitants » in reference to aboriginality as opposed to non-African communities or those having come from elsewhere. This peculiarity distinguishes Africa from the other Continents where native communities have been almost annihilated by non-native populations. Therefore, the ACHPR considers that any African can legitimately consider him/herself as an indigene on the Continent" see the African Commission on Human and Peoples' Rights – *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (2007) at <www.ipacc.org.za/uploads/docs/ACHPR%20Advisory%20Opinion.doc> last visited on 04/12/2014.

More recently, In its study report on the UN Declaration on the Rights of Indigenous Peoples (Hague, 2010), the International Law Association (ILA) has reconfirmed the general issues surrounding the definition of indigenous peoples and, at the same time, has underlined the importance of a definition to assess the scope of the Declaration and all other laws that refer to indigenous peoples.¹¹⁸ In its final Report (Sofia, 2012), the ILA has reconfirmed that indigenous peoples can be considered those people who have:¹¹⁹

- *self-identification*: self-identification as both indigenous and as a people;
- *historical continuity*: common ancestry and historical continuity with pre-colonial and/or pre-settler societies;
- *special relationship with ancestral lands*: having a strong and special link with the territories occupied by their ancestors before colonial domination and surrounding natural resources. Such a link will *usually* form the basis of the cultural distinctiveness of indigenous peoples;
- *distinctiveness*: having distinct social, economic or political systems; having distinct language, culture, beliefs and customary law;
- *non-dominance*: forming non-dominant groups within the society; and
- *perpetuation*: perseverance to maintain and reproduce their ancestral environments, social and legal systems and culture as distinct peoples and communities.

However, given the focus of this thesis on indigenous sacred/secret knowledge, the present work is making use of an additional definition often used to identify indigenous peoples. Until recently, in anthropology, the concept of ‘peoplehood’

¹¹⁸ “... despite the persisting lack of agreement on this subject, it may be appropriate to address the problem of the ‘definition’ for at least two reasons, *i.e.*: a) in order to assess the scope of application of UNDRIP, with respect to which a precise legal conceptualization of the categories of people to whom it is addressed could be helpful to increase its effectiveness; b) in order to prevent that certain States – as has happened in the recent past especially in Africa and Asia – while supporting UNDRIP in principle, claim that it is not applicable in their territory in light of the assumed absence of indigenous communities within their borders (the lack of any conceptualization of indigenous peoples would in fact facilitate this position, which could be hardly criticized lacking precise objective criteria to be used for ascertaining whether a given community is indigenous or not). The second reason is of particular significance, as a conceptualization of the meaning of the term ‘indigenous peoples’ would have the primary purpose of preventing States from being *de facto* free to determine who are or are not indigenous peoples” see the International Law Association (Hague, 2010) electronic document <www.ila-hq.org/en/committees/index.cfm/cid/1024> last visited on 20/01/2012.

¹¹⁹ The International Law Association *Final Report on the Right of Indigenous Peoples* (Sofia, 2012) electronic document <www.ila-hq.org/download.cfm/docid/227B560E-F0F5-4773-BECC974CFC6A11B8> last visited on 10/07/2015.

has been centred on mainly three key factors: indigenous relationship to the land; common spiritual bond and language use.¹²⁰ Subsequently, anthropologist Robert K Thomas added another distinctive factor to be used in the identification of indigenous peoples: sacred history.¹²¹ In their recent work Holm, Pearson and Chavis¹²² revised the traditional concept of peoplehood that identify indigenous peoples in order to demonstrate how “group’s religion is inseparably linked to language, sacred history, and to a particular environment”. Holm and others revised the initial concept of ‘religion’ and replaced it with ‘ceremonial cycles’.¹²³ Given that the present thesis is an interdisciplinary work, and recognizing the importance given to the spiritual (sacred/secret) aspect of indigenous peoples’ cultures, the author will also consider the complex interrelationships that indigenous peoples have with the more sacred and private aspects of their lives, considering them as important as any other indicator of identification. Marrying the model given by Corntassel in his article¹²⁴ (inspired by the existing definition of indigenous peoples and the work of the anthropologists Holm, Pearson and Chavis) the present work considers also indigenous peoples as:¹²⁵

- peoples who believe they are ancestrally related and identify themselves, based on oral and/or written histories, as descendants of the original inhabitants of their ancestral homelands;
- peoples who may, but not necessarily, have their own informal and/or formal political, economic and social institutions, which tend to be community-based and reflect their distinct ceremonial cycles, kinship networks, and continuously evolving cultural traditions;
- peoples who speak (or once spoke) an indigenous language, often different from the dominant society’s language – even where the indigenous language is

¹²⁰ See the work of Edward H Spicer *Cycles of Conquest: the Impact of Spain, Mexico and the United States on the Indians of the Southwest, 1533-1960* (University of Arizona Press, Tucson, 1962) at 576-578.

¹²¹ See Robert K Thomas “Colonialism: Classic and Internal” (1966-67) 6 *New University Thought* 37-45 electronic document <http://works.bepress.com/robert_tjeffthomas/26/> last visited on 04/12/2014.

¹²² Tom Holm, J Diane Pearson and Ben Chavis “Peoplehood: A Model for American Indian Sovereignty in Education” (2003) 18 *Wicazo Sa Review* 7-24 electronic document <<http://muse.jhu.edu/journals/wic/summary/v018/18.1holm.html>> last visited on 04/12/2014.

¹²³ Tom Holm, J Diane Pearson and Ben Chavis “Peoplehood: A Model for American Indian Sovereignty in Education” (2003) 18 *Wicazo Sa Review* 7-24 electronic document <<http://muse.jhu.edu/journals/wic/summary/v018/18.1holm.html>> last visited on 04/12/2014.

¹²⁴ Jeff J Corntassel “Who Is Indigenous? ‘Peoplehood’ and Ethnonationalist Approaches to Rearticulating Indigenous identity” (2003) 9 *Nationalism and Ethnic Politics* at 75.

¹²⁵ Supra at 92.

not 'spoken', distinct dialects and/or uniquely indigenous expressions may persist as a form of indigenous identity; and

- peoples who distinguish themselves from the dominant society and/or other cultural groups while maintaining a close relationship with their ancestral homelands/sacred sites, which may be threatened by ongoing military, economic or political encroachment or may be places where indigenous peoples have been previously expelled, while seeking to enhance their cultural, political and economic autonomy.

The thesis will therefore make use of the working definition of indigenous peoples that has been summarised by the ILA Final Report (supra at 30) including and completing it with the anthropological definitions (see previous page).

And yet, having said this, it is important to point out that indigenous peoples should be able to self-identify themselves if they wish to do so, and international law needs a workable definition to create ad hoc legislation to safeguard indigenous peoples and their cultural integrity. However, it is also true that indigenous cultures differ greatly from the Western idea of culture and any study on indigenous peoples' traditions and heritage should take into account the culturally relative nature of their cultures. That is why the thesis will have a culturally relative approach in respect of the multiculturalism of indigenous peoples and the world.

1.3 – Cultural Relativism

Traditionally, the most notable of the philosophers of the early modern period who firmly believed in cultural relativism is Michel de Montaigne (1533-1592).¹²⁶ With the discovery of the new world, Montaigne was one of the first to argue against the idea that there is an immutable human nature. The evidence provided by the discoveries of new cultures, brought him to assert unconditionally that there are no universal laws of human behaviours and human nature. In his opinion, humans call barbarous every manifestation to

¹²⁶ See Biography at <<http://plato.stanford.edu/entries/montaigne/>> last visited on 02/03/2016

which they are not accustomed.¹²⁷ In his view, and given the profound differences in the moral, legal and spiritual behaviours of the inhabitants of the new world, the only approach possible was ethical relativism. Indeed, Montaigne's point of view was very tolerant and open-minded for his time. According to Baghramian, the argument Montaigne used to deny the existence of a single universal human nature is "empiricist in its orientation and relies on the diversity of human nature – both at the individual and social levels".¹²⁸ In Montaigne's vision "if there was such a thing as natural law, then there would also be consensus on customs, laws and ethics".¹²⁹ But as he stressed "nothing in all the world has greater variety than law and custom".¹³⁰ Thus, there is no universal truth.¹³¹ Today, scholars tend to divide cultural relativism into three subcategories: cognitive relativism, social relativism and conceptual relativism (each of them presents further subcategories which will not be analysed in this work).¹³² According to Baghramian, cognitive relativism is:¹³³

... the view that what is true or false, rational or irrational, valid or invalid can vary from one society, culture or historical epoch to another and that we have no trans-cultural or ahistorical method or standard for adjudicating between the conflicting cognitive norms. Relativism about truth and relativism about logic are the strongest forms of cognitive relativism.

¹²⁷ Michelet de Montaigne *An Apology for Raymond Sebond* (Penguin, London 1987) at Essays 330-50; 202-31; 79-92.

¹²⁸ Maria Baghramian *Relativism* (Routledge, New York, 2004) at 53.

¹²⁹ Supra at 53.

¹³⁰ Michelet de Montaigne *An Apology for Raymond Sebond* (Penguin, London 1987) at 163.

¹³¹ In his blunt mastery, Nietzsche, for example, analyses truth and asks: "What is truth? A mobile army of metaphors, metonymies, anthropomorphisms, in short a sum of human relations which have been subjected to poetic and rhetorical intensification, translation, and decoration, and which, after they have been in use for a long time, strike a people as firmly established, canonical, and binding; truths are illusions of which we have forgotten that they are illusions, metaphors which have become worn by frequent use and have lost all sensuous vigour, coins which, having lost their stamp, are now regarded as metal and no longer as coins" see Friedrich Nietzsche *The Birth of Tragedy and Other Writings* (Cambridge University Press, Cambridge, 1999) at 146.

¹³² For further readings on the definitions used see the electronic document <<http://plato.stanford.edu/entries/relativism/>> last visited on 30/11/2015.

¹³³ Baghramian claims that: "... truth or falsity, the appropriateness or inappropriateness of an ethical belief, is relative to its socio-historical background and that moral beliefs cannot be assessed independently of their social framework. They point to the existence of diverse moral systems and maintain that moral values are grounded on societal conventions, historical conditions, metaphysical beliefs, etc., which vary from one society or societal grouping to another, and argue that there are no neutral standards available to adjudicate between these competing claims" see Maria Baghramian *Relativism* (Routledge, New York, 2004) at 6-7.

She asserts that social relativism is “the claim that the truth and falsity of beliefs, the justification for knowledge-claims and the right or wrong of actions, depend on and are relative to prevailing social and cultural conditions”.¹³⁴ Conceptual relativism believes that:¹³⁵

... the world does not present itself to us ready-made or ready-carved rather we supply the different ways of categorising and conceptualising it. Our knowledge of the world is mediated through a language, a theory or scheme and there is a plurality of such mediatory schemes.

Each different culture represents a coherent part of the whole. Each is legitimate with the observation and its decodification into a cultural symbolism familiar and coherent with the tradition of any given group residing in a specific area of the world and sharing common experiences. However, as Boas points out, environment, economy and history are not necessarily ‘essential’ factors in the development of culture, which can be used to predict and explain why such culture developed the way it did.¹³⁶ In Boas’ words:¹³⁷

... every attempt to deduce cultural forms from a single cause is doomed to failure ... Cultural phenomena are of such complexity that it seems to me doubtful whether valid cultural laws can be found. The causal conditions of cultural happenings lie always in the interaction between individual and society, and no classificatory study of society will solve this problem.

In relation to indigenous peoples, Boas stresses that:¹³⁸

... the fact that many fundamental features of culture are universal, or at least occur in many isolated places, interpreted by the assumption that the same

¹³⁴ “According to this type of relativism, we are in a position to distinguish between true and false beliefs and right and wrong actions and judgements, but only within the parameters of socially given norms and conventions Cultural relativism inspired by the work of social anthropologists who conducted fieldwork among tribal people, is one of the most influential forms of social relativism where it is argued that there can be no such thing as a culturally neutral criterion for adjudicating between conflicting claims arising from different cultural contexts” supra at 7.

¹³⁵ At 7.

¹³⁶ Franz Boas *Race Language and Culture* (The Free Press, New York, 1940) at 255-259.

¹³⁷ See Boas at 257.

¹³⁸ Franz Boas “The limitations of the Comparative Method of Anthropology” (1896) 4 *Science* 901 at 904

features must always have developed from the same causes, leads to the conclusion that there is one grand system according to which mankind has developed everywhere; that all occurring variations are no more than minor details in this grand uniform evolution. It is clear that this theory has for its logical basis the assumption that the same phenomena are always due to the same causes.

This means that cultures initially respond to common intentional and psychological/philosophical purposes. Then culture takes the direction or representation that better responds to the needs of an ethnic group or is coherent with the line of known traditions.¹³⁹ According to social anthropologists, the idea of a culturally neutral criterion for adjudicating between conflicting claims arising from different cultural contexts is morally, ethically and philosophically incorrect. In other words, there is no 'superior culture' v 'inferior culture'. Physics and science in general dismiss the idea of a culture 'A' that can dictate standards for all the other cultures of the world.¹⁴⁰ It is therefore evident that the Western claim to superiority (justified by Darwinist assumptions, now proved wrong)¹⁴¹ is just based on the assumption of an existing universal reality with its 'rights' and 'wrongs' that the more powerful pretend to impose on the rest of the world. In more recent years, however, the growing acceptance of cultural relativism seems to suggest that there is no ground for a universal moral law. Every principle can be accepted only in a certain culture. In this light we could no longer say that the customs of other societies are morally inferior to our own. And yet, it is dangerous to accept cultural relativism in its most strict approach. In doing so, reproachable acts or

¹³⁹ Michael Krausz *Relativism: A Contemporary Anthology* (Columbia University Press, New York, 2010).

¹⁴⁰ In the words of Nietzsche: "'Everything is subjective', you say; but even this is interpretation. The 'subject' is not something given, it is something added and invented and projected behind what there is. – Finally it is necessary to posit an interpreter behind the interpretation? Even this is invention, hypothesis. In so far as the word 'knowledge' has any meaning, the word is knowable; but it is *interpretable* otherwise, it has no meaning behind it, but countless meanings. – 'Perspectivism'. It is our needs that interpret the world; our drives and their For and Against. Every drive is a kind of lust to rule; each one has its perceptive that it would like to compel all the other drives to accept as a norm" see Friederich Nietzsche *The Will To Power* (Random House, New York, 1967) at 267.

¹⁴¹ In his books *On the Origin of the Species by Means of Natural Selection, or The Preservation of Favoured Races in the Struggle for Life*, Darwin suggests that only the fittest organisms in the struggle for survival are able to prevail long enough to pass their superior traits to future generations guaranteeing the survival of that species. This Social Darwinism found many followers such as Herbert Spencer, Joseph A Gabineau, John W Burgess and Theodore Roosevelt to name a few, who strongly used its philosophy to justify all different inequitable socioeconomic relationships.

traditions could be justified in the name of cultural differences.¹⁴² According to Rachels.¹⁴³

... there are some moral rules that all societies will have in common, because those rules are necessary for society to exist. ... Cultures may differ in what they regard as legitimate exceptions to the rules, but this disagreement exists against a background of agreement on the larger issues. Therefore, it is a mistake to overestimate the amount of difference between cultures. Not *every* moral rule can vary from society to society.

Similarly, Lenzerini asserts that certain principles exist which may apply to every culture of the world (well-being, dignity of life, liberty, etc). The argument is based on the assumption that all human beings have common inclinations 'from which an identical perception of rights arises'¹⁴⁴ that support a more general idea of universalism.

Although this thesis makes use of a cultural relativist approach, it also recognises that we live in a multicultural world whose citizens, regardless of cultures and creeds, are united by a desire to fulfil their human potential - in whatever meaning they attach to it - while promoting essential human needs. The next section will explain what multiculturalism is and why it is important to rely on multiculturalism when addressing indigenous peoples' cultures.

¹⁴² "This implication of Cultural Relativism is disturbing because few of us think that our society's code is perfect – we can think of ways it might be improved. Yet Cultural relativism would not forbid us from criticizing the codes of *other* societies; it would stop us from criticizing our *own*. After all, if right and wrong are relative to culture, this must be true for our own culture just as much as for others" see James Rachels "The Challenges of Cultural Relativism" in Nancy Ann Silbergeld Jecker, Albert R Jonsen, Robert A Pearlman (eds) *Bioethics: An Introduction to the History, Methods, and Practice* (2nd ed, Jones & Bartlett Publishers, Sudbury-Massachusetts, 2007) at 123.

¹⁴³ Supra at 125.

¹⁴⁴ Federico Lenzerini *The Culturalization of Human Rights Law* (Oxford University Press, Oxford, 2014) at 25.

1.4 - Multiculturalism

Multiculturalism is considered a “social-intellectual movement that promotes the value of diversity as a core principle and insists that all cultural groups be treated with respect and as equals”:¹⁴⁵ where ‘diversity’ is considered as a value *per se*. In recent years, multiculturalism has insisted on a fundamental question – how can universal human and cultural rights exist in a multicultural world? Globalization and the explosion of media information have brought together cultures so fundamentally different that the whole system based on universalism has been shaken to its foundations. At the same time, some very different cultures share social and economic rights in multicultural societies where their cultural diversity has managed to integrate in the name of social rights and duties of men (see, for example, Native Americans, Māori and Aborigenes). Ayton-Shenker questions if the world is ready for ‘universalism’ and whether a global culture is inevitable.¹⁴⁶ Although she recognises that human and cultural rights are “culturally relative rather than universal”,¹⁴⁷ she also recognises that extreme relativism undermines the very notion of the international legal system.¹⁴⁸ A strictly relativist approach would be, thus, subject to state discretion and could justify violations of human and cultural rights.¹⁴⁹ In the view of the United Nations system, human beings must be guaranteed the respect of their natural-born rights. These rights are not privileges *per se*, but they are an integral part of being a human being. According to the Vienna Declaration and Programme of Action (1993):¹⁵⁰

¹⁴⁵ Blaine J Fowers and Frank C Richardson “Why Is Multiculturalism Good?” (1996) *American Psychologist* 609 at 609.

¹⁴⁶ See Diana Ayton-Shenker “The Challenge of Human Rights and Cultural Diversity” (2014) electronic document <www.un.org/rights/dpi1627e.htm> last visited on 01/12/2014.

¹⁴⁷ See Ayton-Shenker at 1.

¹⁴⁸ “It may be relevant to start by stressing the fact that the very emergence of international law in world history constitutes a tribute to multiculturalism in the sense that it manifests the need felt by very different political entities to create norms to regulate those aspects of their behaviours which required an interaction with other political entities” see Manuel Rama-Montaldo “Universalism and Particularism in the Creation Process of International law” in Sienho Yee and Jacques-Yvan Morin (eds) *Multiculturalism and International Law* (Martinus Nijhoff Publisher, the Netherlands, 2009) at 130.

¹⁴⁹ “By rejecting or disregarding their legal obligations to promote and protect universal human rights, States advocating cultural relativism could raise their own cultural norms and particularities above international law and standards” *supra* at 2.

¹⁵⁰ Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 <www.ohchr.org/en/professionalinterest/pages/vienna.aspx>.

... human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments, and ... the universal nature of these rights and freedoms is beyond question (Art 1).

Having said this, however, international human and cultural rights are not, or should not, be oriented toward one culture at the exclusion of another. No culture is, in this regard, better than another one.¹⁵¹ As such, this thesis recognises the multicultural nature of our world and while it is acceptable to talk of universal basic rights common to every person, the approach of the present work will remain fundamentally relativist while approaching the holistic and profoundly idiosyncratic nature of the cultures of indigenous peoples. In doing so, this work makes use of a cultural relativist approach, but it does not make the mistake of equating cultural relativism with moral relativism which, strictly speaking, believes that the “studies of various cultures have enabled them to show that morality is relative to each culture, which implies, among other things, that we cannot rightly pass moral judgement on members of other cultures except by their own cultural standards, which may differ from ours”.¹⁵² In the author’s view, indigenous cultures and practices can only be understood from the perspective of indigenous peoples and not from the interpretation that the Western world has attached to them. Similarly, indigenous cultures cannot be judged in universalistic terms; these cultures cannot, and will not, be considered as part of the common heritage of humankind because of their intrinsic idiosyncratic diversity from the Western idea of culture and heritage. On the other hand, indigenous issues have reached a universal recognition in the last several decades and their struggles and issues, while peculiar to every community, present similar characteristics. It is therefore the purpose of this work to describe these similarities and try to find an ‘international’ solution to local indigenous-state problems. In doing so, this thesis, makes use of ‘descriptive’ cultural relativism in describing indigenous holistic practices and

¹⁵¹ “Rather than limit human rights to suit a given culture, why not draw on traditional cultural values to reinforce the application and relevance of universal human rights? There is an increased need to emphasize the common, core values shared by all cultures: the value of life, social order and protection from arbitrary rule” see Diana Ayton-Shenker “The Challenge of Human Rights and Cultural Diversity” (2014).

¹⁵² John W Cook *Morality and Cultural Differences* (Oxford University Press, New York, 1999) at 3.

traditions,¹⁵³ but then moves to a more universalistic approach when trying to find a workable solution to the multifaceted problems that indigenous peoples are facing today. The author rejects the more extreme form of cultural relativism – epistemological relativism¹⁵⁴ – because, while acceptable in principle, it becomes unrealistic in its applicability.

Although human beings are divided into fundamentally different cultures, they are nonetheless all part of the world community. Relations among states formalize the recognition of common human, economic, cultural and political aspirations that are the foundations of international agreements and treaties; and indigenous peoples live in states that are active participants in the world's negotiations and, as such, cannot be relegated in a corner with the excuse that their culture is too idiosyncratic to be recognised and safeguarded. In Anaya's view, in fact, integration into the social and political order of the state is what would allow indigenous peoples to live with their cultures intact.¹⁵⁵ In most cases, indigenous peoples are reclaiming their voices and their place in the societies in which they are members.¹⁵⁶ They are linked to the society they are part of and, at the same time, they are linked together with other indigenous

¹⁵³ "...descriptive relativism (also known as *weak relativism*; amounting to a common sense observation that cultures vary), ... *normative relativism* (or *strong relativism*; positing that since all standards are culture-bound, there can be no transcultural moral and ethical standards), up to the most extreme form of relativism, known as *epistemological relativism* (or *extreme relativism*) ... (claiming that humans are shaped exclusively by their culture and therefore there exist no unifying cross-cultural human characteristic)" see IC Jarvie "Rationality and Relativism" (1983) 34 *British Journal of Sociology* 44-60; ME Spiro "Cultural Relativism and the Future of Anthropology" (1986) 1 *Cultural anthropology* 259-286.

¹⁵⁴ "Epistemological relativism may be defined as the view that knowledge (and/or truth or justification) is relative – to time, to place, to society, to culture, to historical epoch, to conceptual scheme or framework, or to personal training or conviction – in that what counts as knowledge (or as true or justified) depends upon the value of one or more of these variables. According to the relativist, knowledge is relative in this way because different cultures, societies, epochs, etc. accept different sets of background principles, criteria, and/or standards of evaluation for knowledge-claims, and there is no neutral way of choosing between these alternative sets of standards. So the relativist's basic thesis is that a claim's status as knowledge (and/or the truth or rational justifiability of such knowledge-claims) is relative to the standards used in evaluating such claims; and (further) that such alternative standards cannot themselves be neutrally evaluated in terms of some fair, encompassing meta-standard" see electronic document <www.blackwellreference.com/public/tocnode?id=g9781405190213_chunk_g978140519021312> last visited on 30/11/2015.

¹⁵⁵ James Anaya "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State" (2009) *Arizona Legal Studies* 13-61 at 15 electronic document <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485138> last visited on 03/12/2014.

¹⁵⁶ "Many [anthropologists] reject relativism in favour of an evolutionary analysis by observing that societies do indeed change their customs by developing more humane habits in conjunction with the growth of their economic, technological, and scientific capabilities. They emphasize the common denominators among cultures, suggesting that it is proper to speak of the common humanity of people as the basis for cross-cultural morality and ethics that are not completely culturally relative" see Elizabeth M Zechenter "In the Name of Culture: Cultural Relativism and the Abuse of the Individual" (1997) 53 *Journal of Anthropological Research* 319 at 326.

groups by the experience of similarly oppressive practices that European colonizers performed with efficacy in foreign lands; and these very practices are what makes indigenous peoples seek workable collective solutions.¹⁵⁷ Having said this, and before going on exploring indigenous cultures, it is important to identify the features of indigenous spiritual traditions, and identify how they differ from Western cultures. The next chapter will introduce and describe indigenous cultures, traditions and holistic way of living.

¹⁵⁷ “We never knew that indigenous people were so global, but we find that we have the same common problems and the same kind of world-view in most cases. That’s why, in the drafting of the UN Draft Declaration on the Rights of Indigenous Peoples, it was easy for indigenous people to come to agreement on what our rights are. It’s easy for us to agree” see Taiaiake Alfred *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford University Press, Don Mills-Ontario, 1999) at 110-111.

Chapter 2

Culture and Indigenous Peoples

From a Western-based perspective, indigenous peoples' cultures remain quite elusive concepts. This is not only because of the striking difference between the cultural expressions of indigenous and non-indigenous peoples in general, but also because, until recently, no real attempt has been made by Western countries significantly to understand and accept holism as the living force and inspiration of indigenous cultures. Not only is holism one of the most fundamental aspects of the lives of indigenous peoples worldwide but, over the centuries, and thanks to the traditional role of the guardians, the protection of holistic values has guaranteed the survival of the collective consciousness of indigenous communities. Most of indigenous cultures, indeed, holistically link indigenous peoples to their land, their ancestors and their creation.

When colonization started and Europeans encountered indigenous peoples, they did not believe they had discovered great civilizations with organised social structures and important oral expressions from which colonizers could learn the ancestral traditions of the world. New settlers and invaders saw only profit in the land and the natural resources that indigenous peoples occupied. Difference in habits, colour of the skin and cultural expressions automatically discharged any idea of equality. And the presumption of cultural superiority over primitivism prevailed over any philosophical discourse. Yet, the colonization process was not just the clash of a 'civilized society' with a 'primitive one'.¹ In actual fact, it deeply challenged the capacity of the people of a culture to penetrate the thought of another culture, and provoked a cultural shock in the observers of indigenous communities. Indeed, every society of the world started as indigenous; and Europeans were forced to recognise that their own cultures were not the 'natural' way people live, for the simple reason that other people

¹ "The term *primitive* was once popular, but it falsely suggests a lack of cultural development or factual understanding, since in fact many native peoples have complex languages and mythologies" see John L Esposito, Darrel J Fasching and Todd Lewis *World Religions Today* (Oxford University Press, New York, 2009) at 39.

live and do things differently² while surviving in their own environment. While studying these intercultural encounters, anthropologist John L Wengle observed that:³

The stability of an individual's sense of identity depends directly on the 'innumerable identifications' he has established with the familiar, personal and interpersonal, concrete and abstract, animate and inanimate of his past and present existence. When these many identifications are threatened, as for example when an individual's social or physical environmental changes rapidly, his sense of identity will be challenged.

When very different cultures meet, it is believed by anthropologists that such cross-cultural contacts usually have dangerous repercussions to the members of each society. If one society is much stronger than the other, such repercussions may be psychologically and physically devastating for the weaker. In the case of indigenous peoples and Europeans, these cross-cultural contacts have proved to be mostly deleterious for indigenous peoples because their cultures were never accepted, but historically rejected and damaged, if not destroyed.⁴ Colonization was followed by cultural repression and regression. The idea that every culture is legitimate in its own right was never considered. As Franz Fanon pointed out in his book:⁵

... Colonialism is not satisfied merely with holding a people in its grip and emptying the native's brain of all form and content. By a kind of perverted logic, it turns to the past of the oppressed people, and distorts, disfigures and destroys it.⁶

Since the time of contact with Europe, indigenous peoples have struggled to rebuild the self-esteem and self-worth they have lost through the dispossession

² Abraham Rosman, Paula G Rubel and Maxine Weisgrau *The Tapestry of Culture* (Altamira Press, Lanham and Plymouth UK, 2009) at 2.

³ John L Wengle *Ethnographers in the Field: the Psychology of Research* (University of Alabama Press, Tuscaloosa, 1988) at 7-8.

⁴ John W Griffith *Joseph Conrad and the Anthropological Dilemma* (Clarendon Press, Oxford, 1995) at 30.

⁵ Franz Fanon *The Wretched of the Earth* (Grove Press, New York, 1966).

⁶ See Fanon at 170.

of their lands and the destruction of their heritage.⁷ The loss of the cultures of many indigenous societies has so far been monumental.⁸

This chapter introduces indigenous culture and holistic way of living and explains how indigenous cultures differ from the traditional Western idea of culture we have inherited. Such analysis is of great importance to understand why the Western legal systems often fail to address and accommodate indigenous rights and expectations. The chapter also explains why it is today still difficult for non indigenous peoples to understand indigenous traditions and which concrete efforts have been made by Western legal traditions to accept the fact that all cultures deserve the same level of protection locally and internationally. The chapter also explains why this thesis accepts the diversity of indigenous cultures and will progressively focus on the more sacred and secret aspects of it. The central focus on secrecy will de facto hinder any real specificity on what indigenous cultures are in light of the focus on secrecy as the chosen management for the preservation of the cultural information. Protocols among indigenous communities dictate that some cultural information is spiritually sensitive and must be kept secret and guarded by custodians. It is impossible to know what is secret (apart from the fact that it must be highly regarded as essential to be kept secret and under the custody of allocated guardians) unless, somehow, the information enters the public domain. In this latter situation, the nature of the information can be assessed case by case and the reasons for its secrecy better understood. Common factor in any discourse on indigenous cultures, however, remains holism as heritage and way of living.

⁷ Julian E Kunnie and Nomalungelo I Goduka *Indigenous Peoples' Wisdom and Power* (Ashgate, Aldershot, 2006) at xv.

⁸ For further reading on the topic, see also the excellent works of Professors Mick Dodson, Larissa Behrendt, Marcia Langton, Martin Nakata and Megan Davis.

2.1 – Conceptions of Culture

Culture in general, and indigenous peoples' cultures in particular, is a very complex, multi-layered subject. From a philosophical point of view, the idea of culture was first 'rationalised' by Plato who defined it '*paideia*', as for the "ideal of a philosophically-shaped human being".⁹ In his thoughts, culture was intended as the "true realization of human nature, the true cultivation of the human being, the only true civilization or 'culture'".¹⁰ The Romans further developed the concept of culture and translated the word into '*cultura anima*', which meant 'civilization' or 'process'.¹¹ The general idea, at that time, was that culture was something to be attained, something not reachable by everyone. Only the few who lived according to cultural value could grasp the 'spiritual element' that was at the core of what culture truthfully was. Over the centuries, culture became the root, the foundation of modern Western civilizations and the reference point from which the West judged other cultures it perceived as less developed.¹² Culture was then limited to human thought/speculation and what the human mind could create. It could never be associated with spiritualism, holism and the knowledge acquired through a deep interaction with nature. Culture was fabricated, acquired, and never intrinsic.

From an anthropological perspective, culture "includes the fundamental values guiding human behaviours".¹³ "It involves at least three components: what people think, what they do, and the material product they produce".¹⁴ Therefore, culture is created by human mental processes, beliefs, knowledge and values. It includes, among other things, people's behaviours, symbols, emotions,

⁹ Yvonne M Donders *Towards a Right to Cultural Identity?* (Intersentia, Antwerpen-Oxford-New York, 2002) at 25.

¹⁰ Supra at 25.

¹¹ At 25.

¹² "Historically, culture as an analytic concept in anthropology developed when there were understood by Europeans to be civilized people and 'primitives' who lived unchanging and utterly different, although internally coherent, lives which had to be tolerated not because they conformed to the values of the observer but because they were, in a sense, off the edge of his or her moral universe" see Sally Engle Merry 'Changing Rights, Changing Culture' in Jane K Cowan, Richard A Wilson and other *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, Cambridge, 2001) at 41.

¹³ Bret Wallach *Understanding the Cultural Landscape* (The Guilford Press, New York and London, 2005) at 14.

¹⁴ John H Bodley *Cultural Anthropology* (Mayfield Publishing Company, London and Toronto, 1994).

rituals and ceremonies.¹⁵ Most of the symbolism¹⁶ and the patterns people use as cultural expressions derive from the past and the traditions that have been reshaped into the present. As such, culture represents a fundamental form of communication through which humankind communicate and perpetuate their knowledge and traditions.¹⁷ It is through culture and its symbolism that human beings “adapt to their physical and social environment, making necessary adaptive strategies to fit new or changing circumstances, and then transmitting this knowledge to the young as social lore”.¹⁸ Since culture is so deeply intertwined with the physical and social environment, its relativism becomes one of its major features. Indeed, culture is an ‘integrated system’, in which all of its parts or traits are “adjusted to each other and make sense in terms of each other, and together they form a coherent and continuous design for living”.¹⁹ Taylor does not make any distinction between culture and civilization. According to him,²⁰ “culture or civilization, taken in its ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society”. Today anthropology rejects the concept that culture is an “integrated, harmonious, consensual phenomena” and tends to consider culture more as “historically produced, globally interconnected, internally contested, and marked with ambiguous boundaries of identity and practice”.²¹ Culture is now understood as being:

¹⁵ See Bodley at 8.

¹⁶ The anthropologist Leslie White wrote that “Culture consists of a system of symbols. A symbol is any sign endowed with general or abstract meaning, and a sign, in turn, is some visual or auditory stimulus, commonly a sound or a visual image, that signifies something specific...Symbols serve in this manner to sort out and classify the world” and “... human symbols, especially words, are veritable taxonomies of experience” see Robert F Murphy *Cultural and Social Anthropology – An Overture* (Prentice Hall, New Jersey, 1989) at 24-25; the late Clifford Geertz defined culture as “the fabric of meaning in terms of which human beings interpret their experiences and guide their actions; social structure is the form that action takes, the ... network of social relations. Culture and social structure are ... different abstractions from the same phenomena” see Roger M Keesing and Andrew J Strathern *Cultural Anthropology – A Contemporary Perspective* (Harcourt Brace & Company, Orlando, 1998) at 23.

¹⁷ Abraham Rosman, Paula G Rubel and Maxine Weisgrau *The Tapestry of Culture* at 5.

¹⁸ Robert F Murphy *Cultural and Social Anthropology – An Overture* (Prentice Hall, New Jersey, 1989) at 26.

¹⁹ See Murphy at 29.

²⁰ Edward Burnett Tylor *The Origins of Culture* (Harper & Row Publishers, New York, 1958) at 1.

²¹ Sally Engle Merry “Changing Rights, Changing Culture” in Jane K Cowan, Richard A Wilson and other *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, Cambridge, 2001) at 41.

... historically produced rather than static, unbounded rather than bounded and integrated; contested rather than consensual; incorporated within structures of power such as the construction of hegemony; rooted in practices, symbols, habits, patterns of practical mastery and practical rationality within cultural categories of meaning rather than any simple dichotomy between ideas and behaviour; and negotiated and constructed through human action rather than superorganic forces.²²

From a philosophical and sociological perspective, culture is:

... the production, distribution, exchange and reception of textualised meaning. ... *Per se*, 'culture' refers to the complex of institutions, artefacts and practices that make up our symbolic universe: to art and religion, science and sport, education and leisure.²³

Raymond Williams²⁴ makes a distinction between culture as 'art' and culture as 'the whole way of life' or society.²⁵ The first being the production of a culture, as opposed to the inner societal forces which brought that specific form of culture into existence. According to the UNESCO Mexico City Declaration on Cultural Policies (1982):²⁶

... in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs; that it is culture that gives man the ability to reflect upon himself. It is culture that makes us specifically human, rational beings, endowed with a critical judgment and a sense of moral commitment. It is through culture that we discern values and make choices. It is through culture

²² Supra at 41-42.

²³ Andrew Milner *Re-Imagining Cultural Studies* (SAGE Publications, London and Thousand Oaks, 2002) at 10-11.

²⁴ Raymond Williams *Culture and Society 1870-1950* (2nd ed, Columbia University Press, New York, 1983).

²⁵ Andrew Milner *Re-Imagining Cultural Studies* at 13.

²⁶ UNESCO Universal Declaration on Cultural Diversity, Nov 2, 2001, UNESCO Doc 31C/Res 25, Annex 1 (2001), adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its thirty-first session on 2 November 2001 <www1.umn.edu/humanrts/instate/culturaldiversity.html> last visited on 15/12/2014.

that man expresses himself, becomes aware of himself, recognizes his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations.

To understand material culture it is necessary to study human subjects in their own society: the way people think through themselves; the way they perceive themselves (identities), and how they use culture in their lives to preserve their human bond with their surroundings and traditions.²⁷ Subjects and objects are profoundly linked together and, only by “considering one, we find the other”.²⁸ Culture is, indeed, both a “cognitive system organised in individual minds” and a “system shared within a community”;²⁹ a system which holds special value for the collective meanings of the public. Culture, therefore, can be a way of life as well as a work of art. As such, culture is not only something that belongs to a particular group of people, associated with their heritage, but also external influences, globalization and creolization can be regarded as cultural phenomena.³⁰ According to the World Commission on Culture and Development (WCCD), culture can be understood simultaneously as tradition and communication: “as roots, destiny, history, continuity and sharing on one hand, and as impulses, choice, the future, change and variation on the other”.³¹ As regards ‘culture’, the Charter of the United Nations (1945)³² (Art 13, 1 (b); 55 (b); 57 and 62) and other international instruments like the Universal Declaration of Human Rights (1948) (Art 27), the International Covenant on Economic, Social and Cultural Rights³³ (Preamble, Article 3 and 15), the General Assembly Declaration on Principles of International Law Concerning Friendly Relations and

²⁷ Chris Tilley, Webb Keane and other (eds) *Handbook of Material Culture* at 4.

²⁸ At 4.

²⁹ Roger M Keesing and Andrew J Strathern *Cultural Anthropology – A Contemporary Perspective* at 51.

³⁰ The first being accepted and explained by cultural relativism, the second typical of deconstructionalist trends. See *supra* at 133.

³¹ At 132; see also UNESCO *Our Creative Diversity* (1995) electronic document

<<http://unesdoc.unesco.org/images/0010/001055/105586e.pdf>> last visited on 15/12/2014.

³² The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter.

³³ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

Cooperation among States in accordance with the Charter of United Nations³⁴ (1970) refer to the concept of culture in “connection with some fields of matters in which cooperation among states shall be pursued by the United Nations”.³⁵ In the above-mentioned provisions, the term culture appears in its more restricted sense covering literary and artistic activities, perhaps even scientific and technical activities but definitely not political, social and economic matters.³⁶ In its Universal Declaration on Cultural Diversity (2001), UNESCO affirms that culture:³⁷

... should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.

UNESCO’s aim is to ensure the preservation and promotion of cultural diversity in the world as an effective mean to guarantee the well-being of international

³⁴ The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations was adopted by the General Assembly on 24 October 1970 (resolution 26/25 (XXV)), during a commemorative session to celebrate the twenty-fifth anniversary of the United Nations (A/PV.1883).

³⁵ Sienho Yee and Jacques-Yvan Morin *Multiculturalism and International Law* (Martinus Nijhoff Publishers, The Netherlands, 2009) at 153-154.

³⁶ At 154.

³⁷ The Universal Declaration on Cultural Diversity specifies that such definition is “in line with the conclusions of the World Conference on Cultural Policies (Mondiacult, Mexico City, 1982), of the World Commission on Culture and Development (*Our Creative Diversity*, 1995), and of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998)”. The Preamble also stresses that “respect for the diversity of cultures, tolerance, dialogue and cooperation, in a climate of mutual trust and understanding are among the best guarantees of international peace and security”. The Declaration also focuses on other important concepts such as cultural diversity by confirming that “Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations (Art 1). In so doing, cultural pluralism is a guarantee of social cohesion in civil societies (Art 2); cultural diversity can be a factor in development (Art 4); Human rights bodies are the enabling environments for cultural diversity (Art 5). The Declaration also reaffirms the right for all cultures to express themselves and make themselves known to the world (Art 6), stressing that cultural diversity and creativity are related and that ‘Creation draws on the roots of cultural tradition, but flourishes in contact with other cultures. For this reason, heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures’ (Art 7) while ensuring that “the free circulation of ideas and works, cultural policies must create conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level. It is for each State, with due regard to its international obligations, to define its cultural policy and to implement it through the means it considers fit, whether by operational support or appropriate regulations (Art 9)” UNESCO electronic document <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html> last visited on 15/12/2014.

relations among States. One of the objectives in its Action Plan to be achieved is the deepening of the international debate on questions related to cultural diversity especially in respect to development and policy making at the national and international level.³⁸ Resolution 60/167 (2006),³⁹ entitled “Human Rights and Cultural Diversity”, develops some of the key concepts of the UNESCO Declaration by including, for example, the promotion of the cultural rights of indigenous peoples.⁴⁰ According to the Resolution, acknowledging and fostering the diversity, of the world is the best way to guarantee peace, freedom and progress on earth.⁴¹ The respect for every culture and its distinctive features is considered as an enrichment to the cultural life of humankind and must be guaranteed.⁴²

While it is true that the world seems oriented toward an acceptance of cultural diversities in all their forms, it is also true that the language used to identify those same cultures is often imbued with the Western idea of ‘culture’, making de facto impossible, for a Westerner, to understand different cultures such as the indigenous ones. The best way to understand a culture rests in the freedom for such culture to describe itself, with its own language and symbolism.

The next section will attempt to describe what holism is and why it is important to understand what it means for indigenous peoples when analysing indigenous cultures.

³⁸ Sienho Yee and Jacques-Yvan Morin *Multiculturalism and International Law* (Martinus Nijhoff Publishers, The Netherlands, 2009) at 155.

³⁹ Resolution adopted by the General Assembly on the report of the Third Committee (A/60/509/Add.2 (Part II)) 60/167 - Human Rights and Cultural Diversity (2006).

⁴⁰ “Recognizing also that the promotion of the rights of indigenous people and their cultures and traditions will contribute to the respect for and observance of cultural diversity among all peoples and nations” electronic document <www.worldlii.org/int/other/UNGARsn/2005/190.pdf> last visited on 14/12/2014.

⁴¹ Supra.

⁴² “In regard to human rights, the Resolution recognizes that, while cultures are distinctive and may differ significantly one from another, it is the duty of human rights bodies to protect not only the relativity of every culture, but also to foster and protect those common set of universal values that humans share. This holds true because human rights are and remain universal, indivisible, interdependent and interrelated. As such, and in total consideration of every cultural diversity, it is the duty of states to guarantee the protection and promotion of all human rights and fundamental freedoms. The Resolution reaffirms that ‘all human rights are universal, indivisible, interdependent and interrelated and that the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis, and that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms” electronic document <www.worldlii.org/int/other/UNGARsn/2005/190.pdf> last visited on 14/12/2014.

2.2 - Indigenous Traditions: A Holistic Approach to Life

Indigenous cultures are generally holistic; where holism⁴³ can be rightly interpreted as the spiritual and symbolic element that integrates and gives life to all the other parts of the cultures of indigenous peoples. It is the spiritual belief that bonds together the members of an indigenous community and ties them to their land and their shared traditions, while, at the same time, inspires the continuous creation of idiosyncratic cultural expressions. Through ceremonies and rituals, indigenous peoples keep these traditions from the past alive and convey them to future generations. Such ceremonies tell stories of creation, survival and evolution, resistance and resilience and their contact with the 'divine'. Holism is the common understanding of life as perceived by indigenous peoples. It is the soul of an indigenous community; its history, belief system and symbolism. It is collective in nature and transmitted from one generation to another orally or through cultural/symbolic expressions. Holism is shaped by time, and it shapes time, the memories of indigenous peoples and their customs. It is the force, the identity and the symbolism a community has experienced and chosen as its collective distinctiveness over the ages. It is the 'dream', the 'bark', the 'tikanga' by which 'specific' indigenous tribes and members of the tribe identify themselves; at the same time, it is the spiritual force leading to the 'dream', the 'bark' and the 'tikanga' which then shape the cultural features of the community. Holism is the living bond between indigenous peoples, their universe with its natural phenomena and the land they have traditionally occupied. Native peoples believe that:⁴⁴

... unseen powers and creative forces formed the Earth, sun, stars, moon, mountains, oceans, rivers, lakes, valleys, plains and other elements of the natural environment. ... Creative forces set the world in motion, establishing natural laws by which the animate and inanimate live, sometimes in harmony sometimes in conflict. Creative forces exist today, often manifesting themselves

⁴³ "Holism is the belief that forces transcending humans explain social structure and change, and that even the thoughts, decisions, and actions of people are explained by those forces" see James A Bell *Reconstructing Prehistory* (Temple University Press, Philadelphia, 1994) at 271.

⁴⁴ Gerald McMaster and Clifford E Trafzer (eds) *Native Universe – Voices of Indian American* (Smithsonian Institution & National Geographic, Washington, 2004) at 16.

in the work of Native peoples, particularly poets, artists, dancers, and singers. These spirits are alive in every cell, every atom of the Native universe. They are a part of the whole, the agent that brought forth and keeps life in motion.

The 'dreamtime' of Australian Aborigines, the Sundance ritual of some North American First Nations, the Ghost Dance (circle dance) among the Sioux or the hallucinogen-induced visions of indigenous communities in Amazonia represent the capability of indigenous peoples to reach altered and heightened states of consciousness and visual perceptions through which the spirits and the cosmos communicate with them and tell them about their creation. Indigenous cultures are strongly bonded with the spiritual and the sacred: a concept often alien to Western cultures that, generally speaking, do not recognize the sacred in nature.⁴⁵

Over the centuries, most of the issues that indigenous peoples had to face were essentially related to the presumption that Western scholars had the 'mental resources' to understand indigenous peoples' cultures. The problem was that the good part of the studies on indigenous cultures was essentially limited to passive observation and not to active participation. For a very long time, no researcher thought to interact with indigenous peoples as a participant in their rituals, relations and activities, or to blend with their collective consciousness.⁴⁶ Anthropologists observed, but did not really understand what they saw, as well explained by Winch in "Understanding a Primitive Society":⁴⁷

... an anthropologist studying such a people wishes to make those beliefs and practices intelligible to himself and his readers. This means presenting an account of them that will somehow satisfy the criteria of rationality demanded by the culture to which he and his readers belong: a culture whose conception of rationality is deeply affected by the achievements and the methods of the

⁴⁵ See Mircea Eliade *The Sacred and the Profane: The Nature of Religion* (Harcourt Brace Jovanovich, 1987); Franz Boas *Race, Language and Culture* (Forgotten Books, 2012); Franz Boas *Anthropology and Modern Life* (Dover Publications, 1987).

⁴⁶ H Russell Bernard (ed) *Handbook of Methods in Cultural Anthropology* (Altamira Press, Walnut Creek, London and New Delhi, 1998) at 259-261.

⁴⁷ Peter Winch "Understanding a Primitive Society" (1964) 14 *American Philosophical Quarterly* 307.

sciences, and one which treats such things as a belief in magic or the practice of consulting the oracles as almost a paradigm of the irrational.⁴⁸

To such detached observers, holism represented something mysterious and elusive that scholars failed to fully comprehend in its symbolic manifestations and cosmologic readings.⁴⁹ Being holism the collective interpretation of life and the universe in which a given indigenous community lives, it can also be symbolic, spiritual and sacred, known and secret. In this, the notion of holism is bound to that of culture. They both are metaphysical processes, where the 'thing' is the very final 'product' of a creative process entailing a spiritual journey. In most cases the journey is more important than the final product. In this, holism differs from the Western idea of culture in the very same abstract creative process that associates them. It is also connected to the idea of religion. As Deloria explains:⁵⁰

Something is observed or experienced by a community, and the symbols and sequences of the mythology are given together in an event that appears so much out of the ordinary experimental sequence as to impress itself upon the collective memories of the community for a sufficiently long duration of time. The basic myth may be refined to some extent, but it is not subject to very much editing because it is the common property of the community, not the exclusive property of the community's poet or religious leaders.

⁴⁸ At 307.

⁴⁹ For further reading on the subject see Kathleen L Gregory "Native-View Paradigm: Multiple Cultures and Culture Conflicts in Organizations" (1983) 28 3 *Administrative Science Quarterly* 359.

⁵⁰ Vine Deloria Jr *God is Red* (Fulcrum Publishing, Golden-Colorado, 2003) at 70-71.

2.3 – Indigenous Cosmology and Spiritual Symbolism – The Guarded Knowledge

Indigenous peoples' universe includes dreams of a cosmology that often 'surprised' them with its marvels. A universe full of memories which are slowly fading away along with the keepers of those ancestral recollections. In this world, the power of spirits was to be found in rivers, rock formations, mountains, forests, oceans and plateaus; places that indigenous peoples considered sacred. They lived and visited these places to hear the 'voices' of spirits, gods, power beings and their ancestors. Indigenous tribes sanctified these locations with ceremonies, rites, dances and songs.⁵¹ They created stories located in these holy spots and transmitted to descendants the mental map of where these spiritual forces could be found.⁵² Native tribes believed that the earth, sky and spirit world were one. Deep down they knew that the Creator or Great Spirit had placed all things on earth for a purpose, and that human survival depended on their capacity to live in balance with all the seen and unseen things.⁵³

For thousands of years, Native peoples have looked to the skies to understand their place in the cosmos and organize their daily lives. Seasonal ceremonies marked the equinoxes and solstices, and tribes throughout Americas used these solar cycles as guides for the best time to hunt, fish, and plant. The sun, moon, and stars are linked to stories of the origins of the universe, of different Native peoples, and of heroic figures.⁵⁴

⁵¹ "Many indigenous peoples have in common their beliefs that the universe is populated by a 'multitude of supernatural beings' that communicate with them through dreams, visions and during rituals. Therefore, they have created ceremonies and cultural expressions that keep open the gate between their world and the one of the Great Spirits. Ancestors, for example, are venerated as spirits, and their 'voice' often guides indigenous communities to specific hunting areas or sacred locations" see Gerald McMaster and Clifford E Trafzer (eds) *Native Universe – Voices of Indian American* (Smithsonian Institution & National Geographic, Washington, 2004) at 16.

⁵² John L Esposito, Darrel J Fasching and Todd Lewis *World Religions Today* (Oxford University Press, New York, 2009) at 48-49.

⁵³ Gerald McMaster and Clifford E Trafzer (eds) *Native Universe – Voices of Indian American* at 85.

⁵⁴ Supra at 86.

Spirituality is the *axis mundi*⁵⁵ around which all the other aspects of indigenous peoples' culture revolve; it is the glue, the most important social component, the basic philosophy and value system around which the whole indigenous community constantly develops. Indigenous religious beliefs represent the way indigenous peoples understand the world they inhabit and the appreciation of the elements which sustain life, such as water, trees, land, food, etc. Their ceremonies are therefore celebrations of life, not just of human life.⁵⁶ In this celebration of life, the universe is generally conceived as being formed by three parts: sky, earth and underworld; all are connected by an axis. Though every indigenous community believes the universe to be inhabited by different entities, most agree on the existence of this axis, or Pillar of the World. The hole created by this axis/pillar opens the road to the Supreme Being and through this holy spirits communicate with shamans and other members of the community trained in the sacred.⁵⁷

Though indigenous representations of the spiritual world may differ from tribe to tribe, all indigenous peoples seem to share a deep indebtedness to nature. Great natural phenomena were, indeed, believed to embody very powerful spirits. The Sun was thus often identified with the Master of Breath, whereas Sunrise was considered the "greatest daily event, and the annual march of the Sun from north to south and back again was seen to control the seasons, the growth of crops and the habits of wild animals".⁵⁸ Dances were dedicated all over the world to the Sun, and children were presented to the Sun in ceremonies. The Sky itself was considered as one of the most powerful of all entities. Its mysteries have been observed since the dawn of time and many indigenous tribes regarded and still regard it as a deity. Durkheim considered indigenous religions as a unified

⁵⁵ "... we have a sequence of religious conceptions and cosmological images that are inseparably connected and form a system that might be called the 'system of the world' prevalent in traditional societies: (a) a sacred place constitutes a break in the homogeneity of space; (b) this break is symbolized by an opening by which passage from one cosmic region to another is made possible (from heaven to earth and vice versa; from earth to the underworld); (c) communication with heaven is expressed by one or another of certain images, all of which refer to the *axis mundi*: pillar (cf. the *universalis columna*), ladder (cf. Jacob's ladder), mountain, tree, vine, etc.; (d) around this cosmic axis lies the world (= our world), hence the axis is located 'in the middle', at the 'navel of the earth'; it is the Center of the World" see Mircea Eliade *The Sacred and the Profane* (Harcourt, Brace & World Inc., 1959) at 37.

⁵⁶ Jennifer IM Reid (ed) *Religion and Global Culture* (Lexington Books, Lanham-USA, 2003) at 40-41.

⁵⁷ Mircea Eliade *Shamanism* (Routledge & Kegan Paul, London, 1964) at 264.

⁵⁸ Roger S Gtllieb (ed) *This Sacred Earth – Religion, Nature, Environment* (Routledge, New York and London, 1996) at 143.

system of sacred beliefs and secret practices connected to sacred things.⁵⁹ For Durkheim, religion itself is a cultural means of fundamental importance for the survival of any given society, whether 'primitive' or not;⁶⁰ and indigenous spirituality and totemism⁶¹ guarantee the collective focus and identification with a common symbol, and explain how through "the unseen but deeply felt cohesive force of their own social group", humans institute religions.⁶²

2.4 - Indigenous Sacred and Secret Knowledge

It is generally difficult to define what is sacred in a culture. In facing the issue of 'sacredness', many legitimate questions arise: What can be considered sacred? Can we say that something is sacred to someone else but not to us? Is there a characteristic that is common to everything that is perceived and can be considered sacred?

⁵⁹ Sometimes deities possessed a combination of human and animal features or were symbolised as humans wearing an animal mask (this iconographic representations are not only limited to native tribes. In ancient Egypt, for example, we have Anubis, Isis and Osiris). Though anthropology considers the representation of animals or half human and half animals a very old practice, when it comes to indigenous peoples, such representations seem to embody 'magical' nonsense. This is particularly true when the sacred is identified with a tree, a place, a river or any other natural phenomena. According to Durkheim "The division of the world into two domains, the one containing all that is sacred, the other all that is profane, is the distinctive trait of religious thought; the beliefs, myths, dogmas ... express the nature of sacred things ... But by sacred things one must not understand simply those personal beings which are called gods or spirits; a rock, a tree, a spring, a piece of wood, in a word, anything can be sacred." He also firmly believed that totemic phenomena were not limited to indigenous societies; all societies needed a sacred totem that embodied the attributes necessary to keep the group united" see Emile Durkheim *The Elementary Forms of the Religious Life* (Allen and Unwin, London, 1976); Robert L Winzeler *Anthropology and Religion* (Altamira Press, Plymouth, 2008) at 10.

⁶⁰ See *World Religions Today* at 52.

⁶¹ "Traditionally, totemism has been conceptualized as a form of social organization in which humans are distributed in interlocking groups that borrow their characteristics from natural kinds, either because these groups are said to share certain attributes with a set of non-humans, or because they take as models for patterning their internal differences the contrasts between eponymous species" see Ton Otto and Nils Bubandt *Experiments in Holism* (Wiley-Blackwell, Oxford, 2010) at 220.

⁶² "In fact, the crucial feature common to all existing religions is the belief in totems, supernatural agents, concluded spirits and souls. Therefore, the fact that some 'elite' religions have been consecrated by societies that consider themselves advanced and in a position to impose canons, does not *implicitly* include that their beliefs were more real or plausible than the ones of the 'primitive societies' they were judging. Like for totems, the creation of native myths, being then more or less credible according to Western standards, is today considered a natural reaction that originates from the attempt to explain natural phenomena. Nonetheless, both myth and totemism are nothing but the fabrication of the anthropologist's mind, which is attempting to give names to the *status quo* of alien societies of which he/she had no prior knowledge. It has its roots in the Western scientific tradition that needs to classify and label everything that is part of the human experience of life" see *World Religions Today* at 52.

As Jane Hubert points out in her article,⁶³ it is challenging to address what 'sacred' is. In the Western society, 'sacredness' is mostly connected to state religion and traditions.⁶⁴ Durkheim clarifies that a common characteristic of all religions is that of the 'supernatural'. And by supernatural is understood a whole set of complex concepts that most of the time surpass the limits of our knowledge: "the supernatural is the world of the mysterious, the unknowable, of the un-understandable".⁶⁵ He carries on by stressing that all religious beliefs (simple and complex) present common characteristics according to which all beliefs are divided into two realms: the sacred and the profane, where 'sacred' is not just made of 'those personal beings which are called gods or spirits; a rock, a tree, a spring, a pebble, a piece of wood, a house, in a word, anything can be sacred'.⁶⁶ A rite can be sacred. According to Durkheim:⁶⁷

... there are words, expressions and formulae which can be pronounced only by the mouths of consecrated persons; there are gestures and movements which everybody cannot perform.

He recognizes that in ancient societies and indigenous ones religion and magic are profoundly entangled; where 'magic' is considered as part of the sacred as well. According to Durkheim, magic has "its ceremonies, sacrifices, lustrations, prayers, chants and dances as well. The beings which the magician invokes and the forces which he throws in play are not merely of the same nature as the forces and beings to which religion addresses itself; very frequently they are identically the same".⁶⁸ However, while in magical acts the underlying idea and aim of the act is always clear and finalized, in the religious ceremonies "there is

⁶³ According to Hubert "the concept of sacred implies restrictions and prohibitions on human behaviour – if something is sacred then certain rules must be observed in relation to it, and this generally means that something that is said to be sacred, whether it be an object or site (or person), must be placed apart from everyday things or places, so that its special significance can be recognised, and rules regarding it obeyed" see Jane Hubert "Sacred Beliefs and Beliefs of Sacredness" Columbia University electronic document <www.columbia.edu/itc/anthropology/schildkrout/6353/client_edit/week9/anth_g6353.pdf> last visited on 20/11/2014.

⁶⁴ Jane Hubert "Sacred Beliefs and Beliefs of Sacredness".

⁶⁵ Emile Durkheim *The Elementary Forms of the Religious Life* (George Allen & Unwin Ltd, London, 1964) at 24.

⁶⁶ See Durkheim at 37.

⁶⁷ At 37.

⁶⁸ At 42.

no purpose directed toward a subsequent event”.⁶⁹ Indigenous sacred knowledge, therefore, includes animism, animatism, totemism and fetishism.⁷⁰ ‘Sacred’ comes from the “late 14th century past participle adjective from obsolete verb *sacren* ‘to make holy’ (c.1200), from Old French *sacrer* ‘consecrate, anoint, dedicate” (12c.) or directly from Latin *sacrare* “to make sacred, consecrate; hold sacred; immortalize; set apart, dedicate”, from *sacer* (genitive *sacri*) ‘sacred, dedicated, holy, accursed,’ from Old Latin *saceres*, from PIE root **sak-* ‘to sanctify’.⁷¹ According to the Oxford dictionary, it is considered ‘sacred’ if it is:⁷²

- connected with God or a god or dedicated to a religious purpose and so deserving veneration: eg *sacred rites and sites*;
- religious rather than secular; embodying the laws or doctrines of a religion;
- regarded with great respect and reverence by a particular religion, group, or individual; and
- regarded as too valuable to be interfered with - sacrosanct.

In countries where there is an institutionalised religion, often the ‘sacred’ is linked to religious practices that might be restricted to specific moments of the day/week or to specific activities and customs. Prohibitions and restrictions are limited to religious contexts where the religion is practiced. In many other

⁶⁹ Bronislaw Malinowski *Magic, Science and Religion* (Greenwood Press, Westport-Connecticut, 1948) at 38.

⁷⁰ “Animism, belief in innumerable spiritual beings concerned with human affairs and capable of helping or harming human interests. Animistic beliefs were first competently surveyed by Sir Edward Burnett Tylor in his work *Primitive Culture* (1871), to which is owed the continued currency of the term. While none of the major world religions are animistic (though they may contain animistic elements), most other religions—e.g., those of tribal peoples—are. For this reason, an ethnographic understanding of animism, based on field studies of tribal peoples, is no less important than a theoretical one, concerned with the nature or origin of religion” electronic document <www.britannica.com/EBchecked/topic/25814/animatism> last visited on 22/12/2014; “Animatism is a term coined by British anthropologist Robert Marett to refer to ‘a belief in a generalized, impersonal power over which people have some measure of control’. Marett argues that certain cultures believe ‘people, animals, plants, and inanimate objects were endowed with certain powers, which were both impersonal and supernatural’” see Gary Ferraro *Cultural Anthropology: An Applied Perspective* (Thompson Wadsworth, Belmont-CA, 2008) at 340; “A fetish (derived from the French *fétiche*; which comes from the Portuguese *feitiço*; and this in turn from Latin *facticius*, ‘artificial’ and *facere*, ‘to make’) is an object believed to have supernatural powers, or in particular, a man-made object that has power over others. Essentially, fetishism is the attribution of inherent value or powers to an object” see electronic document <www.princeton.edu/~achaney/tmve/wiki100k/docs/Fetishism.html> last visited on 22/12/2014.

⁷¹ Electronic dictionary at <<http://dictionary.reference.com/browse/sacred>> last visited on 20/11/2014.

⁷² Electronic dictionary at <www.oxforddictionaries.com/definition/english/sacred> last visited on 20/11/2014.

societies, however, the 'sacred' is not confined to one small area of life, but permeates everything. Hubert recognises that it might be difficult for those who limit their lives to 'religious activities' to fully comprehend when the 'sacred' permeates every aspect of life.⁷³ Sacred is something that has been consecrated, devoted, set apart or dedicated to religious and spiritual use. In their article, Gowda and Khan⁷⁴ define 'sacred knowledge' as:⁷⁵

... something on which no objective price can be fixed and varies from community to community. Its significance lies in the fact that no object or thing is sacred unless a person or group of persons attach certain sanctity with it and revere and respect the same. The object or idea in itself is not sacred. A thing can be sacred only so long as it lasts and occupies a place of honour in the minds of those that consider and hail it as sacrosanct.

In indigenous societies much of the sacred knowledge is and remains essentially secret. Ceremonies often cannot be attended by everyone and objects cannot be utilised by the whole community. Traditionally, everything in indigenous communities has a story and a purpose. Everything responds to protocols and is generally controlled by elders, holders or guardians.⁷⁶ A complex system of laws regulates ceremonies and rituals and the appropriate usage of ceremonial objects.

Basing his words on the lengthy studies of Professor Strehlow,⁷⁷ Justice MD Kirby explains⁷⁸ how the "complete and mandatory secrecy of much of the traditional

⁷³ Jane Hubert "Sacred Beliefs and Beliefs of Sacredness".

⁷⁴ Prakruthi P Gowda and Ushasi Khan "Sacred but Vulnerable: A Critical Examination of the Adequacy of the Current Legal Framework for the Protection of Tribal Sacred Traditional Knowledge" (2008) 1 *NUJS Law Review* 109.

⁷⁵ Supra at 111-112.

⁷⁶ Mikhailovich and Pavli write that, among indigenous peoples, "ceremonies may be associated with ancestral stories, rituals for increasing rain, plants and animal foods, fertility and initiation of young people into adulthood, or associated with deaths and burial. Some rituals and ceremony are restricted to women or men only and may be secret/sacred while others are public. Rituals may be practiced during ceremonies that last for days or weeks, with singing and dancing, storytelling, and the display of body decoration and ceremonial objects. During these ceremonies, the stories connected to the Ancestral Beings are told and retold. All of the symbols of ritual – the words, songs and ritual objects are an outward expression of an inner sacred life" see Katja Mikhailovich and Alexandra Pavli *Freedom of Religion, Belief, and Indigenous Spirituality, Practice and Cultural Rights* (Centre of Education, Poverty and Social Inclusion - Faculty of Education, University of Canberra, 2006).

⁷⁷ TGH Strehlow *Songs of Central Australia* (TBS The Book Service Ltd, 1972).

⁷⁸ The Hon Mr Justice MD Kirby "T. G. H. Strehlow and Aboriginal Customary Laws" (1980) at 172 electronic document

law” of indigenous peoples was “highly developed among Aboriginal society”. Such law “demanded preservation and respect of its secrecy”.⁷⁹

In its *Glossary* on technical terminology, the World Intellectual Property Organization (WIPO) defines ‘sacred’ as:⁸⁰

... any expression of traditional knowledge that symbolizes or pertains to religious and spiritual beliefs, practices or customs. It is used as the opposite of profane or secular, the extreme forms of which are commercially exploited forms of traditional knowledge. (Daniel J. Gervais, *Spiritual but not Intellectual: the Protection of Sacred Intangible Traditional Knowledge*, 11 *Cardozo J. Int’l & Comp. L.* 467, 469-490 (2003)) Sacred traditional knowledge refers to the traditional knowledge which includes religious and spiritual elements, such as totems, special ceremonies, sacred objects, sacred knowledge, prayers, chants, and performances and also sacred symbols, and also refers to sacred traditional knowledge associated with sacred species of plants, animals, microorganisms, minerals, and refers to sacred sites. Whether traditional knowledge is sacred or not depends on whether it has sacred significance to the relevant community. Much sacred traditional knowledge is by definition not commercialized, but some sacred objects and sites are being commercialized by religious, faith-based and spiritual communities themselves, or by outsiders to these, and for different purposes.

Whereas, secret knowledge can be defined as:

... something that is kept from the knowledge of others or shared only with those concerned (Black’s Law Dictionary).

‘Sacred-secret’ traditional knowledge and cultural expressions have a secret or sacred significance according to the customary law and practices of their traditional owners. (Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, Part I (4).)⁸¹

<https://digital.library.adelaide.edu.au/dspace/bitstream/2440/42769/1/alr_V7n2_1980_KirTGH.pdf> last visited on 15/12/2014.

⁷⁹ See Kirby at 185.

⁸⁰ See World Intellectual Property Organization (WIPO) *Glossary* electronic document <www.wipo.int/tk/en/resources/glossary.html#19> last visited on 15/12/2014.

⁸¹ See *Songs of Central Australia* (TBS The Book Service Ltd, 1972).

In the New South Wales Government's Protocols for Staff Working with Indigenous Peoples⁸² sacred and secret refer to the practices that, under indigenous customary laws, refer to information:

- made available only to particular community members;
- used for a particular purpose;
- used at a particular time; and
- only to be seen and heard by particular community members (such as only men, only women or people with certain knowledge).⁸³

The Protocols consider sacred and secret material:⁸⁴

- photographs or descriptions of ceremonies – for example burials;
- rock carvings or drawings;
- photographs of art works featuring sacred stories; and
- photographs or descriptions of Indigenous ceremonial objects.

As we have seen, ceremonies and rituals can be sacred and secret. However, in indigenous traditions, also locations and geographical spaces can be regarded as sacred and, thus, secret.

2.5 - Indigenous Peoples: The Guardians of Sacred Places and Territories

A landscape, like any landscape, can embody different significances; not only because of its geomorphic uniqueness, but also because every person linked to a specific site perceives it differently or is trained to relate to it in a specific holistic way (eg sacrality linked to a place) and, therefore, has an intimate connection with it that can be both shared with the community of which she or he is part and, at the same time, remain a merely personal experience. Thus any landscape

⁸² NSW Department of Commerce *Protocols for Staff Working with Indigenous People* (State of New South Wales (2008) at 11.

⁸³ At 11.

⁸⁴ At 11.

has both physical and non-physical features, where the greatest importance is represented by the perception of being linked to it; as landscape is a “way of seeing and a way of *being*, it only really exist in people’s perception”.⁸⁵ According to the IUCN *Guidelines for Protected Area Managers* (2008):⁸⁶

... sacred natural sites are areas where nature, connection to the greater universe, and collective or individual recollections come together in meaningful ways. Sacred natural sites can be the abode of deities, nature spirits and ancestors, or are associated with hermits, prophets, saints and visionary spiritual leaders. They can be areas for ceremony and contemplation, prayer and meditation. They can also hold secular values for history, culture, relaxation and enjoyment. Sacred natural sites can be important places of reference for cultural identity: for an extended family, a clan, a tribe, a religious faith or entire nations that might root their identity in a specific place in nature.

Since the dawn of time, in fact, places were chosen on the basis of their energies and powers, and used as sacred grounds for the performance of rituals, or for the construction of sacred buildings.⁸⁷ For indigenous peoples any place has spiritual significance, and is therefore traditionally considered ‘sacred’.⁸⁸

⁸⁵ Graham Fairclough, Rodney Harrison and others *The Heritage Reader* (Routledge, London and New York, 2008) at 298.

⁸⁶ “In accordance with their spiritual beliefs, many traditional communities throughout the world have given a special status to natural sites such as mountains, volcanoes, rivers, lakes, springs, caves, forest groves, ponds, coastal waters and entire islands. Many of these have been set aside as sacred places. The reasons for their sacredness are diverse. They may be perceived as abodes of deities and ancestral spirits; as sources of healing water and medicinal plants; places of contact with the spiritual realm, or communication with a ‘more-than-human’ reality; and sites of revelation and transformation. They are sometimes the burial grounds of ancestors, places of pilgrimage, the locale of a temple, shrine or church, or sites associated with special events, saints and spiritual leaders” see Robert Wild and Christopher McLeod (eds) *Sacred Natural Sites: Guidelines for Protected Area Managers*, International Union for Conservation and Natural Resources (Gland, Switzerland, 2008) at 5 and 7.

⁸⁷ “The ancient Egyptians, for example, located and oriented their tombs and temples according to the geometry of the earth and the constellations in the sky. As many other cultures all over the world, Egyptians practiced geomancy, the ‘lore of establishing buildings in relationship to the forms and energies of the earth” see James A Swan *The Power of Place* (Gateway Books, Bath, 1993) at 16; see also Andrew Gulliford *Sacred Objects and Sacred Places* (University Press of Colorado, Boulder, 2000).

⁸⁸ “It is difficult, and in many cases inappropriate, to attempt to identify specific ‘sacred sites’ or sites of special cultural importance to indigenous peoples. All lands and resources are, to a greater or lesser extent, sacred and integral to indigenous peoples’ cultures and spiritual life, and often the most important places cannot be revealed to outsiders” see the Commission on Human Rights Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations (1993) UN Doc E/CN.4/Sub.2/1993/28 at 39.

Given this assumption, however, it is important to explain what can be considered as a 'sacred place' by indigenous and non-indigenous peoples. As history and religion have shown, human beings have always experienced spiritual feelings in the presence of natural phenomena. Sacred places are where "man encounters the numinous and the sublime, and holiness is ... a mystic secret that both fascinates and terrifies".⁸⁹ In Deloria's words:⁹⁰

... the vast majority of Indian tribal religions have a sacred center at a particular place, be it a river, a mountain, a plateau, valley, or other natural feature. This center enables the people to look out along the four dimensions and locate their lands, to relate all historical events within the confines of this particular land, and to accept responsibility for it. Regardless of what subsequently happens to the people, the sacred lands remain as permanent fixtures in their cultural or religious understanding.

The sacred space is therefore considered the 'centre of the world' and the 'privileged place' that permits the communication with the heaven and the underworld, that is, with the gods and the spirits of the dead.⁹¹ Western societies experience the manifestations of the sacred with uneasiness.⁹² Luther Standing Bear⁹³ once remarked that "a people had to be born, reborn, and reborn again on a piece of land before beginning to come to grips with its rhythms". On the same note, Crazy Horse, when asked where his land was, replied that his land was where his dead lay buried.⁹⁴

⁸⁹ Cristoph Engels *1000 Sacred Places* (HF Ullmann Publishing, Germany, 2010) at 6.

⁹⁰ Vine Deloria Jr *God is Red* (Fulcrum Publishing, Golden-Colorado, 2003) at 66.

⁹¹ Mircea Eliade *A History of Religious Ideas* Vol I (The University of Chicago Press, Chicago, 1978) at 118.

⁹² According to the late Mircea Eliade, Professor in Religious Studies at the University of Chicago, Western man "finds it difficult to accept the fact that, for many human beings, the sacred can be manifested in stones or trees ... But what is involved is not a veneration of the stone itself, a cult of the tree in itself. The sacred tree, the sacred stone are not adored as stone or tree; they are worshipped precisely because they are *hierophanies*, because they show something that is no longer stone or tree but the *sacred*. ... By manifesting the sacred, any object becomes *something else*, yet it continues to remain *itself*, for it continues to participate in its surrounding cosmic milieu. ... In other words, for those who have a religious experience all nature is capable of revealing itself as cosmic sacrality. ... The man of the archaic societies tends to live as much as possible *in* the sacred or in close proximity to consecrated objects ... as for the man of all pre-modern societies, the *sacred* is equivalent to a *power*, and, in the last analysis, to *reality*. The sacred is saturated with *being*" see Mircea Eliade *The Sacred and the Profane* (Harcourt, Brace & World Inc, New York, 1959) at 12.

⁹³ James A Swan *The Power of Place* (Gateway Books, Bath, 1993) at 32.

⁹⁴ See Swan at 32.

According to the International Union for Conservation of Nature (IUCN), “all over the world, sacred natural sites and cultural landscapes are expressions of traditional beliefs and land management systems of local and indigenous communities”.⁹⁵ On the same line, the Akwe: Kon Guidelines⁹⁶ promulgated under the Convention for Biological Diversity, considers that sacred sites “may refer to a site, object, structure, area or natural feature or area, held by national Governments or indigenous communities to be of particular importance in accordance with the customs of an indigenous or local community because of its religious and/or spiritual significance” (Guideline 6 (e)).⁹⁷

For indigenous peoples all land they inhabit might have spiritual meaning, from the top of a mountain to the sand of the shore, because Nature itself is mysterious and sacred, some sacred lands can only be used for very limited purposes (eg secret ceremonies) and often only by the guardians of secret traditional knowledge. These lands were selected with great care and their locations and sacredness was known only by very few. Since much of indigenous life depends on the protection and preservation of these ‘sacred places’, knowledge of their location was indeed guarded as a secret and only a few people within the community were allowed to know their locations. For example “a medicine man or woman, in time of tribal crisis, might be told during a ceremony to perform another ceremony at a specific location”,⁹⁸ and this new location would be regarded as sacred and of great importance for the wellbeing

⁹⁵ “Traditional societies around the world have assigned a special status to natural sites considered as sacred – either through the perception of residing deities and spirits, as shrines dedicated to ancestors, or as privileged spiritual sites for contemplation, meditation and even purification of the inner self. The sacredness of a site distinguishes it from the adjoining non-sacred areas that generally make up the bulk of the land area; hence a sacred site can be a relatively small area of land. But as sacred sites are places of seclusion from the non-sacred world they are generally subject to restricted access and therefore less direct human impact in terms of the economic exploitation of natural resources. ... Forests, and more particularly groves, are often considered as abodes of deities and can be considered as sacred. In some parts of the world with strong ancestral belief systems, burial grounds can turn into groves and possibly into outright forests over time. Sacred groves are particularly well marked in non-forested areas such as savannahs and steppes. Their presence in dry lands underlines their ‘special’ character as areas of seclusion that render visible the borderline between the non-sacred and the sacred world. If sacred forests exist in mountains, they can help to prevent soil erosion” see International Union for Conservation of Nature (IUCN) *Conserving Cultural and Biological Diversity: The Role of Sacred Natural Sites and Cultural Landscapes* (UNESCO, Paris, 2006) at 10-12.

⁹⁶ Akwé: Kon are: “Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities” electronic document <www.cbd.int/traditional/guidelines.shtml> last visited on 10/07/2015.

⁹⁷ Secretariat of the Convention on Biological Diversity, Akwe: Kon Guidelines electronic document <www.cbd.int/doc/publications/akwe-brochure-en.pdf> last visited on 04/01/2015.

⁹⁸ James A Swan *The Power of Place* at 34.

of the community from then onward. Native peoples who knew the location of these secret spots, also found it incredibly difficult to explain the intensity of the mystic experiences one could have there, and how these experiences might profoundly influence someone's life.⁹⁹ Protection of the location and its significance have always been the main reason for secrecy. Only those who are prepared can understand and go through such mystic experiences unharmed. Thus, secrecy and respect for sacred places is fundamental in indigenous societies all over the world, because such places "mark the location and circumstances of an event in which the holy became an objective fact of existence".¹⁰⁰ While for Christians holiness is an experience limited to the human race, for most of indigenous peoples holiness can be found in every creation, and humans are just a part of the big whole. Thus a place may narrate the story of the creation and hold the blueprints of the stars.

Generally, the value of a place is given by the people who have known it for generations and have aligned to its rhythm. The Lakota, for example, have regarded the Black Hills as a sacred place for centuries. They are the sanctuary for the animals, and "human beings were not supposed to dominate the hills or make their presence an inhibiting factor in the animals' use of the area".¹⁰¹ It can be rightly said that for many indigenous peoples sacredness extends to all forms of existence. In addition, the cultural value of the place is intrinsic and intangible, and it should be understood and safeguarded by the law. For indigenous culture, land cannot be possessed, and indigenous communities regard sacred sites as something that needs to be protected by secrecy and tribal customary regulations, along with a deeply rooted respect, and often fear, for the sacred itself that inhabits the place.

In respect of a cultural relativist approach, this chapter has briefly described indigenous cultures from the perspective of indigenous peoples or those close to

⁹⁹ See Swan at 35.

¹⁰⁰ At 36.

¹⁰¹ "The special human ability is to communicate with other forms of life, learn from them all, and act as a focal point for things they wish to express. In any sacred location, therefore, humans become the instrument by which all of creation is able to interact and express its totality of satisfaction. The sacred place and the myriad forms of life which inhabit the land require specific forms of communication and interaction. These forms are the particular ceremonies which are performed at the sacred places" see Swan at 37-38.

them. In these few pages it has become evident that indigenous cultures are a very complex phenomena of traditions, customs and spiritualism. The sacred is very present in most of the aspects of indigenous lives. Such sacred places and activities are often secret and require the presence of a guardian (or more than one) who would know, manage and protect the sacred knowledge and tradition. The next chapter will define what indigenous heritage, traditional knowledge and traditional cultural expression are and how they are today included and safeguarded in the international law system.

Chapter 3

Indigenous Heritage, Traditional Knowledge and Traditional Cultural Expressions

This chapter will introduce and explain what heritage, traditional knowledge (TK) and traditional cultural expressions (TCEs) are. As will be seen, indigenous heritage, TK and TCEs are quite complex, stratified concepts. It is worth clarifying that they can be both sacred and secret and, therefore, guarded only by a few people, or constitute common knowledge or heritage of an indigenous community and, therefore, be known by the whole community.

3.1 – Cultural Heritage

‘Heritage’ is an old word originating from “the vocabulary of traditional societies in which values were derived from ancestral relationships”.¹ However, today the word is casually applied to any commodity that “purports to reproduce past styles of architecture, furniture, household utensils or even food”.² In 1968 the United Nations Educational, Scientific and Cultural Organization (UNESCO) defined cultural property as “the product and witness of the different traditions and of the spiritual achievements of the past and ... thus an essential element in the personality of the peoples of the world”.³ Heritage is something which may

¹ “In its original sense, heritage was the property which parents handed on to their children, although the word could be used to refer to an intellectual or spiritual legacy as well. In the nineteenth and early twentieth centuries, as new nation-states fought for legitimacy, people began to speak of a ‘national heritage’” see Graham Fairclough, Rodney Harrison and others *The Heritage Reader* (Routledge, London and New York, 2008) at 31.

² Supra at 31.

³ UNESCO - Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private works – “For the purpose of this recommendation, the term ‘cultural property’ applies to: (a) Immovables, such as archaeological and historic or scientific sites, structures or other features of historic, scientific, artistic or architectural value, whether religious or secular, including -groups of traditional structures, historic quarters in urban or rural built-up areas and the ethnological structures of previous cultures still extant in valid form. It applies to such immovables constituting ruins existing above the earth as well as to archaeological or historic remains found within the earth. The term cultural property also includes the setting of such property; (b) Movable property of cultural importance including that existing in or recovered from immovable property and that concealed in the earth, which may be found in archaeological or historical sites or elsewhere. 2. The term ‘cultural property’ includes not only the established and scheduled architectural, archaeological and historic sites and structure, but also the unscheduled or unclassified vestiges of the past as well as artistically or historically important recent sites and structures”

be inherited and it can denote a gift for future generations to be left unaltered.⁴ Value⁵ underlies the notion of cultural heritage, and the holders of such heritage are the only ones who can give a value to it.

As we have seen in Chapter 2, the cultural identity of a given society forms part of its culture (language, religion, customs, sacred land, arts, works, etc). While the concept of culture often gets lost in its own broad and complex system of beliefs and practices, the idea of cultural identity is sometimes blurred. In general, cultural identity is intended to capture the personification of a culture;⁶ such identity refers to the feelings and emotions that a community experiences in relation to its own culture. Cultural identity is not only identified in certain cultural features, but also in the perception of these features. It is also a non-homogeneous dynamic process that evolves over time;⁷ it concerns the future as much as the past, and it can have both a collective and individual nature. That is why once a culture is lost the identity which linked a society to those cultural expressions might simultaneously vanish forever. In that case, even if the culture is later re-established somehow, the emotions and identities related to it could remain lost forever, or survive only in the artistic heritage which once embodied the culture. Indigenous peoples' material/tangible heritage "could include almost any object of some cultural significance for the indigenous group or community".⁸ Objects among indigenous peoples are often functional and are made for specific purposes and endowed with specific meanings; these significances may widely differ from one community to another. Many

UNESCO electronic document <http://portal.unesco.org/en/ev.php-URL_ID=13085&URL_DO=DO_TOPIC&URL_SECTION=201.html> last visited on 11/09/2011.

⁴ Craig Forrest *International Law and the Protection of Cultural Heritage* (Routledge, London and New York, 2010) at 3.

⁵ "Cultural heritage is value in the sense that it is neither the object nor the practice itself which is of some importance to a people, but the importance itself. It is embodied in an object, a landscape, a dance or all in combination. And it is this which legal regimes aim to protect. The way in which we conceive of, and give value to cultural heritage determines the way in which we 'protect' that heritage" see Craig Forrest *International Law and the Protection of Cultural Heritage* at 3.

⁶ "... cultural identity applies to all those elements of culture through which individuals and groups define and express themselves and by which they wish to be recognised; as a phase in a process which is never completed, it embraces the liberties of which personal dignity is compounded, and covers cultural diversity, the particular and the universal, memory and aspiration" see Council of Europe Doc CAHMIN (May 1995) 16 Appendix IV at 27.

⁷ Yvonne M Donders *Towards a Right to Cultural Identity?* (Intersentia, Antwerpen-Oxford-New York, 2002) at 12.

⁸ Graeme Aplin *Heritage – Identification, Conservation, and Management* (Oxford University Press, Melbourne, 2002) at 13 and 15; see also Craig Forrest *International Law and the Protection of Cultural Heritage* at 2-3.

indigenous peoples use objects, songs, oral narratives and symbolic actions to relate to specific places, events and cultural knowledge they intend to transmit to future generations. Indigenous material culture is the result of the interaction of people with their material worlds, and its material form is the principal means by which culture is stored and transmitted.⁹ As such, indigenous tangible culture can rightly be considered a communication medium; whereas immovable places and sites of sacred significance might include archaeological sites, natural locations, sacred rituals, ceremonial sites and natural objects like trees, rocks and waterfalls.¹⁰ Often intangible culture is imbued with spiritual and sacred significance, and it is often secretly guarded by the custodians of knowledge (see next chapter). Since heritage and culture are the result of a given society and its philosophies, the perception of it differs from one ethnic group to another. It is, therefore, difficult for Western societies to understand that what they perceive and appreciate as 'art', within an indigenous community could be considered 'sacred' and, as such, holding a specific value and significance and, most of the times, such value and significance have nothing to do with trade and commerce as understood by developed countries.¹¹ According to UNESCO, the cultural heritage of a people includes:¹²

... the works of its artists, architects, musicians, writers and scientists and also the work of anonymous artists, expressions of the people's spirituality, and the body of values which give meaning to life. It includes both tangible and intangible works through which the creativity of that people finds expression: languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries (Mexico City Declaration on Cultural Policies, 1982).

⁹ "The most distinctive feature of objects is that they are tangible. This means they have the property of being able to exist in time and space independent of people. Since objects endure through time they also have the ability to bridge passing generations, and bring continuity and a sense of cultural connectedness. Thus material culture can play a critical role in the transmission of culture" see Christina F Kreps *Liberating Culture – Cross-cultural Perspectives on Museums, Curation and Heritage Preservation* (Routledge, London and New York, 2003) at 49.

¹⁰ Craig Forrest *International Law and the Protection of Cultural Heritage* at 3.

¹¹ James AR Nafziger and Ann M Nicgorski (eds) *Cultural Heritage Issues: the Legacy of Conquest, Colonization, and Commerce* (Martinus Nijhoff Publishers, The Netherlands, 2009) at 7.

¹² Mexico City Declaration on Cultural Policies (1982) UNESCO electronic document <http://portal.unesco.org/culture/en/files/35197/11919410061mexico_en.pdf/mexico_en.pdf> last visited on 04/08/2011.

Since its creation, UNESCO has recognised the diversity of world cultural expressions and the intrinsic cultural and spiritual value of every form of tangible and intangible heritage present today in every area of the world. In 1972, the World Heritage Convention considered ‘heritage’ as:¹³

... the inherited patrimony of human experience and knowledge’ mostly referred as ‘cultural property’, along with ‘nature, flora and fauna’ as constitutive parts of the heritage of the world. The Convention was created to ensure ‘the identification, protection, conservation, presentation and transmission to future generations of cultural and natural heritage of outstanding universal value.

This 1972 Convention did not consider cultural objects as heritage and left their protection to domestic jurisdictions.¹⁴ In saying that, the Convention set very important innovative parameters for the preservation of world heritage. Firstly, it introduced a ‘world heritage’ category, which is of inestimable value for all human beings; and second, it put together culture and nature, through recognising no difference in the greatest works of humankind as well as those of nature. By including natural heritage, the Convention goes beyond its sole purpose of protecting cultural heritage, and yet it lacks a formal definition of what ‘world heritage’ is, mending the lacuna with a list of what can rightly be considered cultural and natural heritage.¹⁵ Generally speaking, the lack of formal definitions in international law is quite dangerous. It limits the scope of the law only to the subjects enumerated in the list, while leaving out what could

¹³ Operational Guidelines for the Implementation of the World Heritage Convention (2005) UNESCO, Doc WHC. 05/2, at para 7.

¹⁴ Francesco Francioni (ed) *The 1972 World Heritage Convention – A Commentary* (Oxford University Press, New York, 2008) at 3; see also UNESCO *World Heritage – Challenges for the Millennium* (UNESCO World Heritage Centre, Paris, 2007).

¹⁵ UNESCO World Heritage Convention (1972) - Article 1: “For the purposes of this Convention, the following shall be considered as ‘cultural heritage’: monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features ...; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape ...; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view. Article 2 - For the purposes of this Convention, the following shall be considered as ‘natural heritage’: natural features consisting of physical and biological formations or groups of such formations ...; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants ...; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty” see UNESCO <<http://whc.unesco.org/en/conventiontext>> last visited on 08/08/2011.

reasonably be outside the specificity of any list but being included within the broad definition. Having said this, the question here is whether world heritage has value as per the sum of its parts, and if every part holds a value in its own right, or whether such value is confined to the general sum of the parts or the category that includes it (eg monuments, buildings etc). In the second case, what constitutes heritage for indigenous peoples might not fit into the category dictated by the rest of the world; whereas it might find its own niche as heritage when considered in isolation (eg sacred territories). A clear example of what stated above is represented by the Moeraki Boulders (Aotearoa-New Zealand).¹⁶ These boulders have spiritual significance for Māori people and are today legally protected against removal or damage. While not all rock formations represent a form of heritage (otherwise all the rocks of the world would amount to heritage), the spiritual significance of the Moeraki Boulders of New Zealand make them part of the culture of Māori people and, therefore, justify their legal protection as heritage. The *Heritage New Zealand Pouhere Taonga Act* (2014), which replaced the *Historic Places Act* (1993), dedicates its Section 4 to the criteria of recognition of historical, cultural and ancestral significance.¹⁷

The 1972 Convention focuses on the ‘monumentality’ and ‘exceptionality’ of heritage as perceived from a universalistic Western viewpoint. Nothing in it refers to culture as perceived from a non-Western perspective.¹⁸ This Convention is a key piece of international legislation that was not conceived as including and safeguarding intangible heritage. Such a category could be

¹⁶ The Moeraki Boulders are situated on Koekohe Beach at a place named Kumara, midway between Hampden and Moeraki townships in North Otago (South Island). According to Maori legend, the origin of the boulders dates from the loss of the *Arai-te-uru*, one of the large sailing canoes that came from distant Hawaiki. On her quest south for the precious greenstone, the canoe was wrecked near Shag Point (Matakaea). The reef which today extends seawards is the canoe's petrified hull, while close by, in the shape of a prominent rock, stands the petrified body of her commander. Strewn along the beach are the boulders which represent the eel baskets, calabashes, and kumaras washed ashore from the wreck. The name Moeraki (Moerangi) means “drowsy day” see the Encyclopaedia of New Zealand electronic document <www.teara.govt.nz/en/1966/moeraki-boulders> last visited on 16/02/2017

¹⁷ See *Heritage New Zealand Pouhere Taonga Act* 2014 electronic document <www.legislation.govt.nz/act/public/2014/0026/26.0/DLM4005414.html> last visited on 16/02/2017

¹⁸ As stressed by Dario Gamboni in 2001: “On the world level, the real success of the idea of world heritage will depend upon the degree to which the universalism born of European Enlightenment comes to be perceived as truly universal, rather than appearing as a new form of colonialism or the cultural face of economic globalization. ... what we will need is a forum in which several worlds, with differing visions of heritage or legacy, can come into contact, communicate, and negotiate those differences” see Dario Gamboni “World Heritage: Shield or Target” (2001) electronic document <www.getty.edu/conservation/publications/newsletters/16_2/feature.html> last visited on 09/08/2011.

arbitrarily included as a sub-category of 'world heritage'; however, it could be argued that if intangible heritage were one of the focuses of the Convention, its category would have been present within the Convention from the start. Since indigenous peoples consider the tangible and intangible aspects of their culture as intertwined, the risk is that most of their traditions and the spiritual, sacred/secret element of their heritage would be left out of the aims of the Convention and totally unprotected.¹⁹ During the 30th World Heritage Committee session in Lithuania (2006), delegates from New Zealand shared their profound scepticism about such categorizations, underlining the impossibility of severing tangible and intangible heritage into two distinct categories.²⁰ As pointed out by the Māori delegation:²¹

We have concerns that indigenous worldviews could be set into frameworks that have been designed from primarily other perspectives. The distinction between tangible and intangible qualities for example becomes blurred when viewed through an indigenous lens. The two dimensions are immunised to perspectives that infuse a sense of spirit and connection to animate and inanimate objects and locate all matters along a continuum that includes people and immaterial cultures.

In consideration of the actual lack of protection for the world's intangible heritage, in 1994 the Operational Guidelines for the Implementation of the World Heritage Convention included the 'cultural landscape' category (counting three typologies of landscape)²² as "... the inscription of such landscapes on the

¹⁹ "In 1999 the representatives of the Pacific Islands regions urged the World Heritage Committee to take responsibility for intangible heritage. They argued that: 'the meeting suggested that the World Heritage Convention should ensure protection of the intangible heritage, including languages and traditions. The meeting noted that the terms of the convention may need to be expanded to include recognition of the importance of the spiritual element of heritage'" see Britta Rudolff *'Intangible' and 'Tangible' Heritage - A Topology of Culture in Contexts of Faith* (Scientia Bonnensis Publishing, Germany, 2010) at 20.

²⁰ "From the New Zealand perspective, although tangible and intangible heritage can sometimes be severed, in many instances they cannot. For New Zealand, the tangible and intangible link with much of our heritage cannot be severed. This is especially so with cultural landscapes. To suggest otherwise, ... is nonsense. The land and the people, like the relationship between them, are one. This relationship cannot be compartmentalised" see Britta Rudolff *'Intangible' and 'Tangible' Heritage* at 10; see UNESCO World Heritage Committee (Lithuania, 2006) UNESCO Doc WHC-06/30.COM/19 electronic document <<http://whc.unesco.org/archive/2006/whc06-30com-19e.pdf>> last visited on 22/01/2015.

²¹ UNESCO World Heritage Committee (Lithuania, 2006) Doc WHC-06/30.COM/19 supra.

²² "(1) clearly defined landscapes designed and created intentionally by man; (2) organically evolved landscapes, which can be either relict landscapes or continuing landscapes; (3) associative cultural

World Heritage List is justifiable by virtue of the powerful religious, artistic or cultural associations of the natural element²³ rather than material cultural evidence, which may be insignificant or even absent”;²⁴ whereas ‘cultural routes’²⁵ were added to the Operational Guidelines in 2005.

The idea that protection in 1972 should be limited to monuments changed over time and reflected the new trend in archaeology, anthropology and ethnology that had started considering monuments as manifestations of “social structures, ways of life, beliefs, ... and system of knowledge”.²⁶ Today, the spiritual values of cultural heritage are one of the main concerns of UNESCO. In 2003, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage filled the dichotomic gap that used to divide tangible and intangible heritage by including “instruments, objects, artefacts and cultural spaces”, but it did not include the spiritual/sacred element of the cultural knowledge kept by elders and bearers.²⁷ The absence of this part might be of no great importance for Western societies, but is very important for the transmissibility of indigenous peoples’ traditions.²⁸

landscapes” see UNESCO – *Operational Guidelines* electronic document <<http://whc.unesco.org/archive/opguide94.pdf>> last visited on 10/08/2011.

²³ “In 1993, Tongariro National Park (NZ) became the first property to be inscribed on the World Heritage List under the revised cultural criteria ... The Committee recognised that these mountains have cultural and religious significance for the Maori people and represent the spiritual link between this community and its natural environment. It was the first time that a natural World Heritage site received international recognition for its intangible cultural values” see Barbara T Hoffman (ed) *Art and Cultural Heritage – Law, Policy and Practice* (Cambridge University Press, Cambridge, 2009) at 201.

²⁴ UNESCO – *Operational Guidelines* (1994) para 39 (iii) *supra* footnote 20.

²⁵ See UNWTO Global Reports on Cultural Routes and Itineraries electronic document <http://cf.cdn.unwto.org/sites/all/files/pdf/global_report_cultural_routes_itineraries_v13.compressed_0.pdf> last visited on 12/04/2017

²⁶ UNESCO – *Operational Guidelines* (1994a) at 2-3 *supra*.

²⁷ Art 2 – “1. The ‘intangible cultural heritage’ means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity ... - 2. The ‘intangible cultural heritage’ ..., is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship”.

²⁸ As stressed by Daes in 1993: “Indigenous peoples regard all products of the human mind and heart as interrelated, and as flowing from the same source: the relationship between the people and their land, and with the spirit world. Since the ultimate source of knowledge and creativity is the land itself, all of the art and science of a specific people are manifestations of the same underlying relationship, and can be considered as manifestations of the people as a whole” see Erica-Irene Daes *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, Commission on Human Rights UN Doc E/CN.4/Sub.2/1993/28 at para. 21.

To this end, the Universal Declaration on Cultural Diversity (UNESCO 2001)²⁹ considers cultural rights as an integral part of human rights (Art 5). The Declaration stresses the importance for states to adopt “inclusive ways of encouraging cultural diversity through policies of cultural pluralism’ and the necessity to secure human rights as ‘guarantees of cultural diversity’”.³⁰ Furthermore, it encourages the recognition of the implicitly collective nature of indigenous peoples’ human and cultural rights.³¹ In the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, UNESCO defines cultural diversity as:

... the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used (Art 4.1).

Having said this, it is also true that UNESCO remains vague on what constitutes culture in many conventions and declarations and mostly refers to heritage³² as the expression of what culture is. However, Articles 1 and 2 of the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) put together cultural and natural heritage as interchangeable

²⁹ Universal Declaration on Cultural Diversity (UNESCO 2001) Article 2 – “From cultural diversity to cultural pluralism: In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life” UNESCO electronic document <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html> last visited on 01/08/2011.

³⁰ UNESCO electronic document <<http://unesdoc.unesco.org/images/0012/001271/127162e.pdf>> last visited on 12/07/2015.

³¹ Universal Declaration on Cultural Diversity: “Article 4 –The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope” see Peter Poole *Cultural Mapping and Indigenous Peoples* (UNESCO, 2003).

³² The term heritage was officially adopted in the 1972 Convention on the Protection of the World Cultural and Natural Heritage (UNESCO).

elements that can be regarded as: Culture.³³ In other words, in a holistic fashion, culture as well as land becomes part of the heritage of human beings who could only have developed a certain culture in certain natural scenarios. UNESCO's message has finally come to terms with a world profoundly diverse where culture and heritage might have profoundly different meanings according to each ethnic group and geographical area.³⁴ Article 1 of the Convention for the Safeguarding of Intangible Cultural Heritage (UNESCO 2003),³⁵ speaks of "cultural spaces" as inclusive of locations and natural settings. Such inclusion is evident in the following passage of the article, where the stress goes to "[peoples'] response to their environment, their interaction with nature and their history".³⁶

In general, international law does not focus on culture in its abstract form (that is left to anthropology and philosophy), but rather on the end result of the cultural

³³ Article 1: "For the purposes of this Convention, the following shall be considered as 'cultural heritage': monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view. Article 2 - For the purposes of this Convention, the following shall be considered as 'natural heritage': natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty".

³⁴ In the Preamble of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UNESCO, 2005) it reads: "3. Being aware that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples and nations, 4. Recalling that cultural diversity, flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, is indispensable for peace and security at the local, national and international levels, 5. Celebrating the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments" at <[www.unesco.org/culture/culturaldiversity/convention_en.pdf](http://www.unesco.org/culture/ culturaldiversity/convention_en.pdf)> last visited on 04/03/2015

³⁵ In the words of the Convention for the Safeguarding of Intangible Cultural Heritage (UNESCO 2003): "The 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity (Article 1)".

³⁶ "Therefore, in general heritage is acknowledged as complex phenomena where all the elements (sacred and non) are intertwined together. Heritage includes everything: from traditions, to rituals, languages, cultural expressions and traditional knowledge. It represents something that is common to all mankind, in the sense that every civilization, community and people are united by idiosyncratic features which define who they are and from whom they descend". See also previous chapter.

process. That is why law mostly refers to ‘cultural heritage’ or ‘cultural expressions’ and, as of today, there is no legally-accepted definition of ‘traditional knowledge’. As a result of this, vital questions remain: Where is the legal definition of indigenous cultural heritage? What does it include? The next few pages will attempt to answer some of these questions.

3.2 – Traditional Knowledge: When Heritage Gets Lost in Translation

Traditional Knowledge (TK) is included in the heritage of indigenous peoples (tangible and intangible)³⁷ and indigenous heritage rights.³⁸ Its includes traditional medicinal knowledge in the context of health policy;³⁹ expressions of folklore;⁴⁰ folklore or traditional and popular culture in the context of safeguarding traditional culture;⁴¹ intangible cultural heritage such as sacred and secret knowledge, oral traditions, rituals and spiritual practices; indigenous

³⁷ “The heritage of indigenous peoples has a collective character and is comprised of all objects, sites and knowledge including languages, the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory of traditional natural use. The heritage of indigenous peoples also includes objects, sites, knowledge and literary or artistic creation of that people which may be created or rediscovered in the future based upon their heritage’, ‘The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic creation such as music, dance, song, ceremonies, symbols and designs, narratives and poetry and all forms of documentation of and by indigenous peoples; all kinds of scientific, agricultural, technical, medicinal, biodiversity-related and ecological knowledge, including innovations based upon that knowledge, cultigens, remedies, medicines and the use of flora and fauna; human remains; immovable cultural property such as sacred sites of cultural, natural and historical significance and burials” see Erica-Irene Daes Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples at UN Sub-Commission on The Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1995/26, as revised in E/CN.4/Sub.2/2000./26) at para 12 and 13.

³⁸ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève 2002) Doc WIPO/GRTKF/IC/3/9 at para 18 electronic document <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_9.pdf> last visited on 22/01/2015.

³⁹ “The sum total of the knowledge, skills and practices based on theories, beliefs and experiences indigenous to different cultures, whether applicable or not, used in the maintenance of health, as well as in the prevention diagnosis, improvement or treatment of physical and mental illness” see Doc WHO/EDM/TRM/2000 electronic document <http://whqlibdoc.who.int/hq/2000/WHO_EDM_TRM_2000.1.pdf> last visited on 12/07/2015.

⁴⁰ See the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982) see Annex II at Section 2.11.

⁴¹ “Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognised as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts” see UNESCO Recommendations on the Safeguarding of Traditional Culture and Folklore (1989) electronic document <http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html> last visited on 14/08/2011.

intellectual property⁴² and indigenous cultural property;⁴³ traditional ecological knowledge and traditional and local technology, knowledge, know-how and practices;⁴⁴ traditional knowledge, innovations and practices, in the context of conservation and equitable use of biological resources. In its broader definition, traditional knowledge can be rightly considered a complex and multifaceted concept including and encompassing different components. It is not produced systematically but “in accordance with the individual or collective creators’ responses to and interaction with their cultural environment”.⁴⁵ As representative of the cultural values of an indigenous society, some traditional knowledge can be held collectively and some other is held and safeguarded by custodians and holders of knowledge. TK incorporates the core values, practices, traditions and beliefs that characterize the traits of the community; it is generally transmitted orally from one generation to another and remains, therefore, largely undocumented.⁴⁶ TK can belong to “culturally distinct tribal people” as well as to “traditional communities that are not necessarily removed from the

⁴² “Indigenous intellectual property includes the information, practices, beliefs and philosophy that are unique to each indigenous culture. Once traditional knowledge is removed from an indigenous community, the community loses control over the way in which that knowledge is used. In most cases, this system of knowledge evolved over many centuries and is unique to the indigenous peoples’ customs, traditions, land and resources” see Office of the High Commission on Human Rights WIPO and Indigenous Peoples Leaflet no 12 electronic document <www.ohchr.org/Documents/Publications/GuideIPleaflet12en.pdf> last visited on 22/01/2015.

⁴³ “Cultural property is defined in the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) as property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; elements of artistic or historical monuments or archaeological sites which have been dismembered; antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; objects of ethnological interest; (g) property of artistic interest, such as: pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); original works of statuary art and sculpture in any material; original engravings, prints and lithographs; original artistic assemblages and montages in any material; rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc) singly or in collections postage, revenue and similar stamps, singly or in collections; archives, including sound, photographic and cinematographic archives; articles of furniture more than one hundred years old and old musical instruments” see WIPO *Glossary* electronic document <www.wipo.int/tk/en/resources/glossary.html#23> last visited on 22/01/2015.

⁴⁴ See WIPO Doc - WIPO/GRTKF/IC/3/9 at para 18.

⁴⁵ WIPO International Forum on Intellectual Property and Traditional Knowledge: Our Identity, Our Future (2002) electronic document <www.wipo.int/arab/en/meetings/2002/muscat_forum_ip/ipmk_mct02_i3.htm> last visited on 29/02/2012.

⁴⁶ WIPO International Forum on Intellectual Property and Traditional Knowledge: Our Identity, Our Future (2002).

cultural mainstream of a country”.⁴⁷ Not all TK is sacred to these communities, and safeguarded by specific groups of guardians. Since most indigenous cultures are of old lineage they present traditional features, which have been developed over considerable length of time. Such common knowledge is traditional because it belongs to the tradition of the community, yet it is not necessarily sacred or secret and it does not need the protection of the guardians. On the other hand, some TK is obviously so spiritually significant to the indigenous community that its transmission is guarded by selected members of the community who hold the knowledge in their custody and make sure it is not exploited by members and non-members of the community. These custodians often oppose the commercialization of the knowledge under any circumstance. As poignantly explained by Darrel Posey:⁴⁸

... although conservation and management practices are highly pragmatic, indigenous and traditional peoples generally view this knowledge as emanating from a *spiritual* base. All creation is sacred, and the sacred and secular are inseparable. Spirituality is the highest form of awareness. In this sense a dimension of traditional knowledge is not local knowledge but knowledge of the *universal* as expressed in the local. In indigenous and local cultures, experts exist who are peculiarly aware of the organizing principles of nature, sometimes described as entities, spirits, or natural law. Thus, knowledge of the environment depends not only on the relationship between humans and nature but also between the visible world and the invisible spirit world.

In 1998-99, the WIPO Secretariat organized fact-finding missions to investigate the world situation of TK. To facilitate the study, the Secretariat made use of a ‘working concept’ that defined TK as follows:⁴⁹

⁴⁷ See Graham Dutfield *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Routledge, UK, 2004) at 92-93.

⁴⁸ Darrell Addison Posey “Selling Grandma: Commodification of the Sacred Through Intellectual Property Rights” in Elazar Barkan (ed) *Claiming the Stones Naming the Bones* (The Getty Research Institute, Los Angeles, 2002) at 201.

⁴⁹ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève 2002), Doc WIPO/GRTKF/IC/3/9 at para 25 electronic document <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_9.pdf> last visited on 29/02/2011.

... 'traditional knowledge' ... refer[s] to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. 'Tradition-based' refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; 'expressions of folklore' in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description of TK would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of 'heritage' in the broad sense.

Given this lengthy description, WIPO underlines the impossibility of relying on a global definition of TK⁵⁰ enforceable by law. The Committee argued that it is incredibly difficult to create a definition that will be harmonious and uniform in national laws that "is expected to result from an international legal instrument".⁵¹ In saying so, however, WIPO explains that it has become the

⁵⁰ "Given this highly diverse and dynamic nature of traditional knowledge it may not be possible to develop a singular and exclusive definition of the term. However, such a singular definition may not be necessary in order to delimit the scope of subject matter for which protection is sought. This approach has been taken in a number of international instruments in the field of intellectual property" see WIPO at Doc WIPO/GRTKF/IC/1/3 at para 65.

⁵¹ "A relatively general approach to definition may be especially called for in relation to traditional knowledge as the subject matter of protection, in contrast to the areas of intellectual property already surveyed here. TK subject matter is particularly dynamic and variable, and more likely to be shaped by local, cultural factors than other forms of IP (as discussed in the parallel paper, WIPO/GRTKF/IC/3/8). Moreover, there have been calls in the work of the Committee for there to be some recognition of customary law¹¹ as an element in the definition and protection of TK. If there is to be reflection of customary law in the characterization of traditional knowledge, this would necessarily involve a more general form of definition at the international level, given the diverse and distinct quality of customary laws; equally, if weight is to be given to local cultural factors, this could also entail a general umbrella definition at an international level. This general approach was foreshadowed in document WIPO/GRTKF/IC/1/3 (itself echoing comments in the 'WIPO Report on Intellectual Property Needs and Expectations of Traditional Knowledge Holders')" see WIPO Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) (WIPO, 2001) electronic document <www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf> last visited on 29/02/2012.

tendency of international instruments in the field of IP law to avoid definitions that would be too 'exclusive'. Instruments such as The Berne Convention for the Protection of Literary and Artistic Works, for example, prefers to give an enumeration of all the 'creations' that can rightly be considered fitting within the 'Literary and Artistic Works' category protected under the Convention (Art 2.1).⁵² Today WIPO considers TK as:⁵³

- know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.
- embracing the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with TK.
- referring to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations.

According to WIPO "TK can be found in a wide variety of contexts, including: agricultural, scientific, technical, ecological and medicinal knowledge as well as biodiversity-related knowledge".⁵⁴ Broadly, TK (secret and non-secret) includes the knowledge handed down by indigenous peoples from previous generations (especially elders or guardians)⁵⁵. It also includes 'empirical knowledge', which is gained through a careful and lengthy observation of the environment and the interaction with it; then there is a 'revealed knowledge', which is acquired through dreams, visions and intuitions that are of spiritual and sacred nature and is not necessarily shared by everyone within the community. An important aspect of TK on which everyone agrees is that TK is 'traditional' only to "the

⁵² The Berne Convention for the Protection of Literary and Artistic Works (1886, last amended on 1979), Art 2(1) states that: "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science".

⁵³ See WIPO electronic document <www.wipo.int/tk/en/tk/> last visited on 16/02/2017

⁵⁴ See WIPO electronic document <www.wipo.int/tk/en/tk/> last visited on 16/02/2017.

⁵⁵ By the word 'elder' or 'guardian' is intended that the community recognises as imbued with the knowledge, responsibility and spiritual awareness necessary to perform the role requested of them.

extent that its creation and use are part of the cultural traditions of communities".⁵⁶ In this sense, 'traditional' does not necessarily mean that the knowledge is ancient. Such knowledge can be created at any time as a response to the challenges that indigenous communities face in their interaction with their natural, social and cultural environment.⁵⁷ Thus, TK is a living and evolving phenomena deeply rooted within indigenous communities; it is part of indigenous and non-indigenous heritage and traditions and it is managed by a complex set of rules created by the community. It may have been as well developed in ancestral times, but it is subject to constant improvement and adaptation to the environment; it is expressed in material and non-material form and it may possess commercial value, depending on its potential or actual usage.⁵⁸ Though indigenous communities might be less individualistic than Western societies, the idea that 'ownership' might constitute an alien concept to them is an often romantic misconception. Traditional societies are not hostile to the idea of ownership or property. This is reflected in the complex set of customary laws that control and manage traditional knowledge in a non-inclusive way, which is often similar to the Western intellectual property regime (see Chapter 6 at 6.2). As such, TK is also a phenomenon which is not limited to indigenous societies. As explained by Dutfield:⁵⁹

... the existence of TK is not limited to certain types of society but, on the contrary, may be found in all societies no matter how modern they might appear to be and how *untraditional* much of the knowledge in circulation within them is.

This does not mean that TK is present in every society but, on the other hand, globalization and Westernization have not succeeded in totally eradicating traditional practices from every traditional society of the world.

⁵⁶ WIPO *Intellectual Property and Traditional Knowledge: Our Identity, Our Future* (2002) electronic document <www.wipo.int/arab/en/meetings/2002/muscat_forum_ip/iptk_mct02_i3.htm> last visited on 29/02/2012.

⁵⁷ *Supra*.

⁵⁸ See Carlos M Correa "Traditional Knowledge and Intellectual Property" commissioned by The Quaker United Nations Office (QUNO, Genève) electronic document <www.quno.org/geneva/pdf/.../Traditional-Knowledge-IP-English.pdf> last visited on 19/09/2012.

⁵⁹ Graham Dutfield "Legal and Economic Aspects of Traditional Knowledge" in Keith E Maskus and Jerome H Reichman (eds) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, 2005) at 497.

According to WIPO, as cultural phenomena, TK does not exist in isolation; it is broader than the ‘expressions of folklore’⁶⁰ and ‘indigenous knowledge’ but narrower than the concept of ‘indigenous heritage’ (tangible and intangible), which also includes indigenous ancestral remains, sacred indigenous sites, oral traditions, performing arts, social practices, rituals and festive events; knowledge concerning nature and the universe.⁶¹ In its Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), WIPO defined which working words describe indigenous cultural manifestations. Concerning ‘indigenous heritage’, WIPO decided to use the definition created ad hoc by Daes in her Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples;⁶² whereas ‘indigenous knowledge’ is used to “describe knowledge held and used by communities, peoples and nations that are ‘indigenous’”⁶³ (in this context WIPO makes use of the definition of indigenous peoples used by Cobo).⁶⁴

⁶⁰ See WIPO *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999) (WIPO, 2001) electronic document <www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf> last visited on 05/03/2012; “Though the word Folklore is still present in many international instruments, it is today widely considered an archaic definition with a Eurocentric connotation that lacks any holistic interpretation of indigenous cultural expressions. Nonetheless, WIPO still uses the word ‘folklore’ in its instruments: ‘Representatives of the Spanish-speaking countries at the 1984 session of the WIPO-UNESCO Group of Experts on the Protection of Expressions of Folklore by Intellectual Property took the position that ‘folklore’ was an archaism, with the negative connotation of being associated with the “creations of lower or superseded civilizations’. On the other hand, other participants in the same session pointed out that the term had acquired new meaning and legitimacy. From the work of the Committee to date, it is already apparent that ‘folklore’ is still used internationally by a number of governments, organizations and academics. The WIPO-UNESCO Model Provisions, using this term, remain an international reference point in this area, and the term appears in several operational legal mechanisms at the domestic and international levels” see WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève 2002) Doc WIPO/GRTKF/IC/3/9 at para 19 electronic document <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_9.pdf> last visited on 29/02/2011.

⁶¹ Erica-Irene Daes UN Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples see Principle 12 and 13 electronic document <www.unhcr.ch/Huridocda/Huridoca.nsf/0/42263fd3915c047ec1256929004f1ffc?Opendocument> last visited on 29/02/2011.

⁶² “The term ‘heritage’ appears within the context of, for example, the ‘heritage of indigenous peoples’. WIPO understands ‘heritage of indigenous peoples’ (and other peoples) to refer broadly to the items described in paragraphs 11 and 12 of the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, 1995, elaborated by the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Dr Erica Irene Daes” see WIPO *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999) (WIPO, 2001) at 23 electronic document <www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf> last visited on 05/03/2012.

⁶³ Supra at 23; “On the other hand, ‘indigenous knowledge’ is also used to refer to knowledge that is itself ‘indigenous’” see supra.

⁶⁴ WIPO refers to ‘indigenous peoples’ as: “... those which, having a historical continuity with ‘pre-invasion’ and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those countries, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identities, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems” see Special J Martínez

While indigenous knowledge is regarded as TK or expressed in traditional cultural expressions (TCEs), not all traditional knowledge is 'indigenous'.⁶⁵ Knowledge is, in fact, not 'traditional' because of its object, nor its subject matter or content, nor its age or antiquity, nor its aesthetic qualities.⁶⁶ Its traditionality depends on the way it has been preserved and transmitted within any given community, rather than its antiquity.⁶⁷ As such, TK is inherently linked to the traditions of the community, its customary laws, and the social and cultural function it has for the community. Therefore, all indigenous knowledge is mostly limited to the microcosm it inhabits and represents. According to Dutfield, "TK has always been adaptive because adaptation is the key to survival in a precarious environment".⁶⁸

Today, most of the international instruments that deal with TK focus on its biological resources' character and its possible commodification in the national and international markets. Nonetheless, as explained above, this thesis addresses TK in its broadest character, including traditional cultural expressions and indigenous heritage. This decision is due to the fact that, holistically, no indigenous knowledge is disconnected from the whole, but it is rather the expression of the whole. A painting could represent a sacred practice indigenous peoples use for the cultivation of their land; or a story, song or dance could be performed to bring rain or good fortune in harvesting. Limiting TK to a compartmentalized system of knowledge (mostly connected with biodiversity and preservation management) is in general wrong because in the indigenous

Cobo Study of the Problem of Discrimination Against Indigenous Populations UN Doc E/CN.4/Sub.2/1982/2/Add.6 electronic document
<<http://social.un.org/index/IndigenousPeoples/Library/Mart%C3%ADnezCoboStudy.aspx>> last visited on 05/03/2012; see also chapter 1 of this thesis.

⁶⁵ "On the other hand, 'indigenous knowledge' is also used to refer to knowledge that is itself 'indigenous'" see WIPO Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge at 24.

⁶⁶ Antony Taubman and Matthias Leistner "Traditional Knowledge" in Silke Von Lewinski (ed) *Indigenous Heritage and Intellectual Property* (2nd ed, Wolters Kluwer, The Netherlands, 2008) at 59-60.

⁶⁷ "While it is often thought that tradition is only about imitation and reproduction, it is also about innovation and creation within the traditional framework. Tradition is not immutable. Cultural heritage is in a permanent process of production; it is cumulative and innovative. Culture is organic in nature and in order for it to survive, growth and development are necessary – tradition thus builds the future" see Barry Bergey "A Multi-faceted Approach to the Support and Conservation of Folk and Traditional Culture" paper delivered at the International Symposium on Protection and Legislation of Folk/Traditional Culture, (Beijing, December 18 to 20, 2001) in Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Doc WIPO/GRTKF/IC/5/3/ at 12.

⁶⁸ See Graham Dutfield "TRIPS-Related Aspects of Traditional Knowledge" electronic document <http://leeds.academia.edu/GrahamDutfield/Papers/890629/TRIPSrelated_Aspects_of_Traditional_Knowledge> last visited on 25/09/2012.

world, there is no compartmentalization. In her studies, anthropologist Martha Johnson⁶⁹ has defined the existence of another type of TK: traditional ecological knowledge (TEK) that presents features similar to the widest TK definition. It is defined as knowledge that:

- is recorded and transmitted through oral tradition;
- is learned through observation and hands-on experience;
- is based on the understanding that the elements of matter have a life force. (All parts of the natural world are therefore infused with spirit);
- does not view human life as superior to other animate and inanimate elements: all life-forms have kinship and are interdependent;
- is holistic (whereas western science is reductionist) - and is intuitive in its mode of thinking (whereas western science is analytical);
- is mainly qualitative (whereas western science is mainly quantitative);
- is based on data generated by resource users. (As such it is more inclusive than western science, which is collected by a specialized group of researchers who tend to be more selective and deliberate in the accumulation of facts);
- is based on diachronic data (whereas western science is largely based on synchronic data);
- is rooted in a social context that sees the world in terms of social and spiritual relations between all life-forms. (In contrast, western science is hierarchically organized and vertically compartmentalized); and
- derives its explanations of environmental phenomena from cumulative, collective and often spiritual experiences. Such explanations are checked, validated, and revised daily and seasonally through the annual cycle of activities.⁷⁰

Given the innovative work and in depth analysis of Posey's and Dutfield's studies over the years, this thesis will use their definition of TK (inclusive of TEK) as follows:

⁶⁹ Martha Johnson "Research on Traditional Environmental Knowledge: Its Development and Its Role" in *Lore: Capturing Traditional Environmental Knowledge* (International Development Research Centre, 1992).

⁷⁰ Supra.

1. knowledge of current use, previous use, or potential use of plant and animal species, as well as soils and minerals;
2. knowledge of preparation, processing, or storage of useful species;
3. knowledge of formulations involving more than one ingredient;
4. knowledge of individual species (planting methods, care, selection criteria, etc.);
5. knowledge of ecosystem conservation (methods of protecting or preserving a resource that may be found to have commercial value, although not specifically used for that purpose or other practical purposes by the local community or the culture);
6. classification systems of knowledge, such as traditional plant taxonomies.
7. renewable biological resources (eg plants, animals, and other organisms) that originate (or originated) in indigenous lands and territories;
8. cultural landscapes, including sacred sites;
9. non-renewable resources (e.g., rocks and minerals);
10. handicrafts, works of art, and performances;
11. traces of past cultures (eg ancient ruins, manufactured objects, human remains);
12. images perceived as 'exotic', such as the appearance of indigenous people, their homes and villages, and the landscape; and
13. cultural property (ie culturally or spiritually significant material culture, such as important cultural artefacts, that may be deemed sacred and, therefore, not commodifiable by the local people

* Categories and embodiments of traditional knowledge and folklore developed by Dutfield ⁷¹

According to WIPO, in its holistic character, TK presents four unique characters:⁷²

- the spiritual and practical elements of traditional knowledge are intertwined and thus are inseparable (it is in this sense that every element of traditional knowledge serves as an inherent factor of cultural identification of its holders);
- since traditional communities generate knowledge as a response to a changing environment, traditional knowledge is in constant evolution and incrementally improving;
- traditional knowledge covers different fields, in areas of cultural expressions and in technical domains; and
- because its creation is not necessarily undertaken through a formal, expressly systematic procedure, traditional knowledge may appear less than formal in character, and its full character and systematic nature may only be apparent with a greater understanding of the cultural context and rules that govern its creation.

⁷¹ Graham Dutfield *Intellectual Property Rights and Sustainable Development* (2003) UNCTAD - ICTSD Project on IPRs and Sustainable Development, International Trade & Sustainable Development Series No 4 at 19.

⁷² WIPO - Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève 2002) Doc WIPO/GRTKF/IC/3/8 at 14.

While WIPO addresses the spiritual nature of TK, its traditional ‘working definition’ does not seem to address the knowledge that is kept secret and under the protection of the guardians of knowledge. Today WIPO recognises that indigenous secret knowledge exists and needs special consideration because of its sensitive nature.⁷³ Until now, WIPO has mostly only referred to the secret knowledge that has already been fixed in some form (eg recorded, registered). To fill such gap, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is currently working on “Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions” as an instrument on TK and TCE which will be internationally recognised and accepted.⁷⁴ Its Article 3 on the criteria for eligibility specifically refers to the indigenous culture that is sacred and secret or otherwise known by only few within the community and how states should guarantee the safeguarding of such knowledge.⁷⁵ Traditional secret knowledge

⁷³ Protection of secret and sacred TK and TCEs - Confidential or secret records or registers of TK and TCEs safeguard particularly sensitive cultural materials, access to which and use of which are exclusively reserved for the relevant traditional holders in accordance with their customary laws and practices. Restricted access contributes to the protection of TK and TCEs from an IP perspective, as it prevents disclosure and third-party uses prohibited by those customary laws.

⁷⁴ The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore “The Protection of Traditional Cultural Expressions: Draft Articles” electronic document <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_33/facilitator_s_text_rev_2.pdf> last visited on 16/02/2017.

⁷⁵ Option 1 [Scope of Protection 3.1: Where the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] is [sacred], [secret] or [otherwise known only] [closely held] within indigenous [peoples] or local communities, [Member States]/[Contracting Parties] [should]/[shall]: (a) [ensure that beneficiaries have the exclusive and collective right to]/[provide legal, policy and/or administrative measures, as appropriate and in accordance with national law that allow beneficiaries to]: i - [create,] maintain, control and develop said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions]; ii - [discourage] prevent the unauthorized disclosure and fixation and prevent the unauthorized use of [secret] [protected] traditional cultural expressions; iii - [authorize or deny the access to and use/[utilization] of said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] based on prior and informed consent or approval and involvement and mutually agreed terms;] iv - protect against any [false or misleading] uses of [protected] traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and v. [prevent] prohibit use or modification which distorts or mutilates a [protected] traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary. (b) [ensure that]/[encourage] users [to]: i - attribute said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] to the beneficiaries; ii - [provide beneficiaries with [a fair and equitable share of benefits]/[fair and equitable compensation], arising from the use/[utilization] of said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] based on prior informed consent or approval and involvement and mutually agreed terms; see The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore “The Protection of Traditional Cultural Expressions: Draft Articles” (the revision of the articles is due by March 2017) electronic document <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_33/wipo_grtkf_ic_33_4.pdf> last visited on 16/02/2017.

remains today a widely avoided subject. It is known that it exists but, for its very elusive and secretive nature, it is rarely addressed. Many scholars⁷⁶ are to today discussing indigenous TK, TEK, TCE and indigenous traditions at national and international level. Many of them have written extensively on the subject, and although their works have brought invaluable contribution to the study on indigenous peoples' culture, none of them has so far specifically addressed the unique challenges of protecting effectively indigenous sacred and secret knowledge.

In order to successfully address indigenous cultures, and given that this thesis focuses on the sacred, secret knowledge and culture in the custody of indigenous custodians, and given that indigenous culture includes secret knowledge, the thesis will use interchangeably the working definitions of knowledge, culture and heritage as reflective of the holistic, sacred and secret element of indigenous practices and way of life.⁷⁷ In saying this, it is important to remember that the description of TK is a Western-made characterization imposed upon the cultural forms of indigenous peoples. No indigenous peoples participated in the development of such categorizations and in the development of the political-rhetorical potential of modern intellectual property law that implies a privatization derived from and imposed by the market models of capitalist societies.

⁷⁶ For further information, see the works of Professors Christopher Antons, Katy Bowrey, Donna Craig, Susan Corbett, Peter Drahos, Susy Frankel, Matthew Rimmer, Henry Reynolds, Natalie Stoianoff, Ana Vrdoljak, Patricia Adjei, Miranda Forsyth, Daniel Robinson, Robynne Quiggin and Valmaine Toki.

⁷⁷ In 1999 UNESCO defined TK as encompassing: "... spirituality, spiritual knowledge, ethics and moral values, social institutions (kinship, political, traditional justice), dances, ceremonies and ritual performances and practices, games and sports, music, language, names, stories, traditions, songs in oral narratives, land and sea and air, all sites of cultural significance and immovable cultural property and their associate knowledge, cultural environmental resources, traditional resource management including traditional conservation measures, all material objects and moveable cultural property, all traditional knowledge and expressions of indigenous cultures held in *ex situ* collections, indigenous peoples ancestral remains, human genetic materials, scientific, agricultural, technical and ecological knowledge, and the skills required to implement this knowledge (including that pertaining to resource use practices and systems of classification), the delineated forms, parts and details of visual compositions (designs), permanently documented aspects of traditional indigenous cultures in all forms (including scientific and ethnographic research reports, papers and books, photographs and digital images, films and sound recordings)" see UNESCO Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands (Noumea, 15 -19 February 1999) electronic document <<http://portal.unesco.org/culture/en/files/14264/10645002355Noumea1999.pdf/Noumea1999.pdf>> last visited on 23/01/2015.

3.3 - Traditional Cultural Expressions

Traditional Cultural Expressions⁷⁸ (TCEs), on the other hand, include, among other things, the ‘expressions of folklore’,⁷⁹ ‘indigenous culture’ and ‘tangible and intangible cultural heritage’. In recent years WIPO has adopted the term ‘traditional cultural expressions’ in the place of ‘expressions of folklore’ because the term folklore was believed to have a negative, paternalistic connotation implying antiquated or obsolete knowledge. Indeed, while indigenous culture might well be ‘traditional’, it is not necessarily old, and it varies continuously over time. Today, WIPO defines TCEs as ‘traditional cultural expressions’ and ‘expressions of folklore’ which means:⁸⁰

... productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of (name of country) or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- verbal expressions, such as folk tales, folk poetry and riddles, signs, words, symbols and indications; musical expressions, such as folk songs and instrumental music;
- expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and, tangible expressions, such as: productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic,

⁷⁸“Traditional music, designs, rituals, performances, oral narratives, names, symbols and signs communicate a community’s beliefs and values, embody skills and know-how, reflect a community’s history, and define its cultural identity. Traditional cultural expressions (TCEs) are therefore valuable cultural assets of the communities who maintain, practice and develop them. They can also be economic assets – they are creations and innovations that can, if so wished, be traded or licensed for income-generation and economic development. They may also serve as an inspiration to other creators and innovators who can adapt the traditional expressions and derive new creations and innovations” see WIPO electronic document <www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/tce_provisions_summary.pdf> last visited on 24/02/2012.

⁷⁹“WIPO recognises the term TCE as being synonymous with ‘expressions of folklore’ – ‘The terms ‘TCEs’ and ‘expressions of folklore’ are used synonymously in international policy discussions concerning this area of intellectual property’ - though in recent years the term folklore and its paternalistic or negative connotation has been slowly discontinued in any discourse on indigenous TK and TCE” see Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Doc WIPO/GRTKF/IC/5/3/.

⁸⁰ See WIPO Intellectual Property and Traditional Cultural Expressions/Folklore electronic document <www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, p 6> last visited on 28/09/12.

woodwork, metal ware, jewellery, basket weaving, needlework, textiles, carpets and costumes;

- crafts;
- musical instruments; and
- architectural forms.

In the draft articles of The Protection of Traditional Cultural Expressions the Intergovernmental Committee considers “[Traditional] cultural expression means any form of [artistic and literary], [creative and other spiritual] expression, tangible or intangible, or a combination thereof, such as actions⁸¹, materials,⁸² music and sound,⁸³ verbal⁸⁴ and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms]”.⁸⁵ Indeed, WIPO explains that ‘expressions of’ traditional culture (or ‘expressions of’ folklore) may be either intangible, tangible or, most usually, combinations of the two – an example of such a ‘mixed expression of folklore’ would be a woven rug (a tangible expression) that expresses elements of a traditional story (an intangible expression).⁸⁶ The difficulty in addressing the cultural content of TCEs depends on the symbolic meaning, artistic dimension, and cultural values that derive from the diverse cultural identities of those originating the expression.⁸⁷

⁸¹ [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed] see The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore “The Protection of Traditional Cultural Expressions: Draft Articles” (the revision of the articles is due by March 2017) at 4 electronic document <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_33/wipo_grtkf_ic_33_4.pdf> last visited on 16/02/2017.

⁸² [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places] at supra.

⁸³ [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals] at supra.

⁸⁴ [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols] at supra.

⁸⁵ See supra at 4.

⁸⁶ Supra at footnote 68.

⁸⁷ Article 4: “1. Cultural diversity – ‘Cultural diversity’ refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used. 2. Cultural content – ‘Cultural content’ refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities. 3. Cultural expressions ‘Cultural expressions’ are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content” see the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

UNESCO clarifies that “the term ‘cultural expressions’ was to encompass both ‘cultural contents’ and ‘artistic expressions’”.⁸⁸ Having said this, in general, all cultural expressions should be included and safeguarded by the freedom of expression, information and communication as stated in Art 2 and 18 of the Universal Declaration on Human Rights and other legislation at the national and international level. They should also be included and safeguarded by the right to self-determination as worded in Common Art 1 (ICCPR and ICESCR) and Art 3 of the UNDRIP. In 1985 UNESCO and WIPO developed a Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions in which it recognized the following as falling into the TCEs/folklore category:

- verbal expressions (folksongs and instrumental music); verbal expressions (folktales, folk poetry and riddles);
- expressions by actions (dances, plays and artistic forms or rituals); and
- tangible expressions (productions of various types of folk art, crafts, musical instruments and architectural form).

After many years of study on indigenous cultural heritage, TK and TCEs, UNESCO created a Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005 that is essentially encouraging states to accept the fundamental values of world cultural diversity and its multi-faceted manifestations. The Convention (which entered into force in March of 2007) urges states to “protect and promote the diversity of cultural expressions” (Art 1.a) and to “promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels” (Art 1.e). The Convention recognizes that the respect for culturally diverse forms of expressions is not limited to any production of the mind that might have commercial value, but it is rather a fundamental human right common to all people of the world. In Article 2.1 it is stated that:

⁸⁸ UNESCO - Preliminary Report by the Director-General Setting Out the Situation to Be Regulated and the Possible Scope of the Regulating Action Proposed, Accompanied by the Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, Doc 33 C/23 (2005) at para 7 electronic document <www.ohchr.org/Documents/Issues/IPeoples/Seminars/UNESCOconv-e.pdf> last visited on 12/07/2015.

.... cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

It does not strictly refer to ‘the production of the mind’, because the expression of one’s own culture is fundamental for the preservation and transmission of the idiosyncratic characteristics of any given culture inhabiting the earth.⁸⁹ In addition to that, although the working definitions generally used are quite broad and inclusive, similar to TK, there is no widely accepted definition of TCEs that is enforceable by law.⁹⁰ The fact that TCEs are based on traditions and are the result of traditions conveyed orally, visually by transmission, imitation or in performances, might set them aside from the intellectual property framework, but not from any culturally diverse notion of heritage. Indeed, TCEs and TK are the result of individual and collective forces that distinguish the tradition of a given community as a whole; as such no one has the authority to de facto alienate the rights connected to the cultural expressions. In addition to that, while the expression of the knowledge is generally tangible, the underlying knowledge is intangible⁹¹ and difficult to define and address through modern

⁸⁹ UNESCO - Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 2.3 stresses that: “the protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples”. Article 2.5, on the other hand, underlines that “cultural development, and the possibility for each culture to evolve without external constraints and influences, is as important as the economic development of any given society” see electronic document <<http://en.unesco.org/creativity/convention/2005-convention/2005-convention-text>> last visited on 12/07/2015.

⁹⁰ See UNESCO and WIPO *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* at 9-10 electronic document <www.wipo.int/wipolex/en/details.jsp?id=6714> last visited on 28/09/2012.

⁹¹ UNESCO defines intangible culture/heritage as: “Art 1. The ‘intangible cultural heritage’ means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given

laws. Such knowledge is safeguarded by the coordinated work of traditional customary laws and the keepers/guardians of knowledge whose duty of care is to protect and transmit indigenous knowledge to future generations.

Indeed, within indigenous communities, the role played by the guardians of knowledge is essential. Not only do they know the culture they are protecting, but they also know why their role is traditionally so important.

The next chapter will introduce who indigenous guardians of knowledge are, what their role entails and why it is regulated by a complex set of customary laws. The chapter will necessarily address the shared characteristics that indigenous guardians have among indigenous communities worldwide.

solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development. – 2. The ‘intangible cultural heritage’, as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship” see UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003) <<http://en.unesco.org/creativity/convention/2005-convention/2005-convention-text>> last visited on 12/07/2015.

Chapter 4

Guardianship and Stewardship

This chapter introduces one of the main topics of this thesis: indigenous guardians.¹ To understand the argument made in this work, it is important to understand who indigenous guardians are, what traits they share worldwide and how they differ from the creators of knowledge. The relationship between guardians or custodians (people who hold a duty of care) of knowledge to the cultural and intellectual production of the commons is, in fact, quite different from that of creators, inventors and innovators.² Guardians do not create the knowledge, they inherit it from their ancestors. The information inherited might be fairly recent, but it is never new as in the case of authors or creators.³ The concepts of guardianship and custodianship themselves suggest that an element of the knowledge kept might be secret and not supposed to enter the public domain.⁴ If commodification of knowledge was, in fact, the intention of the indigenous community, there would be no need to control the circulation of such knowledge by addressing guardians and custodians⁵ and by regulating their 'duty of care' with customary laws.

As ancestral customary practices, stewardship and guardianship have come a long way; they usually originate from the customary body of laws that indigenous communities created at the beginning of their history. Most of these laws indeed go back to pre-colonial time and are not influenced by the Anglo-American notion of cultural property. In the Anglo-American system, the creator or the owner of the knowledge or cultural expression can designate a custodian

¹ The discussion on who the guardians of TK are is also analysed in the case study reported in Chapter 7.

² Djims Milius "Justifying Intellectual Property in Traditional Knowledge" (2009) 2 *Intellectual Property Quarterly* at 193.

³ The concept will be further expanded in the next chapters.

⁴ Djims Milius "Justifying Intellectual Property in Traditional Knowledge" at 193.

⁵ "... the difference between concepts of guardianship suggests that the domain of the commons where a particular element of traditional knowledge resides might not always be (or have the potential to become) public. And that is by virtue of the exercise of discretion of those who hold that knowledge in their trust, and whose tradition might dictate they view as sacred or otherwise" at 193.

of his property, or can consider the property just a commodity⁶ and sell it in the marketplace.⁷ Indigenous peoples, on the other hand, being unfamiliar with the concept of commodification, traditionally gave no monetary value to their heritage.⁸ The World Intellectual Property Organization (WIPO) uses the terminology 'traditional knowledge holders' to refer to:⁹

... all persons who create, originate, develop and practice traditional knowledge in a traditional setting and context. Indigenous communities, peoples and nations are traditional knowledge holders, but not all traditional knowledge holders are indigenous.

However, not all traditional knowledge holders are guardians of the same knowledge. WIPO also uses the word 'custodians' to refer to those people within indigenous communities who act as guardians of knowledge.¹⁰ Indeed, within indigenous societies there are 'special' members who can act as guardians of traditionally transmitted forms of more or less sacred/secret knowledge. While the Western world tends to consider all indigenous peoples as holders/guardians of knowledge, guardianship is generally an internal structure that indigenous

⁶ "In economics, a commodity is the generic term for any marketable item produced to satisfy wants or needs" see Karl Marx "A Contribution to the Critique of Political Economy" in the *Collected Works of Karl Marx and Frederick Engels: Volume 29* (International Publishers, New York, 1987) at 269.

⁷ Kristen A Carpenter, Sonia K Katyal and others "Clarifying Cultural Property" (2010) 17 *International Journal of Cultural Property* 581 at 587.

⁸ "The true Indian sets no price upon either his property or his labour. His generosity is only limited by his strength and ability. He regards it as an honour to be selected for a difficult or dangerous service, and would think it shame to ask for any reward ... Nevertheless, he recognises rights in property. To steal from one of his own tribe would be indeed disgrace if discovered, the name of 'Wamanon', or Thief, is fixed upon him forever as an unalterable" see John E Lewis (ed) *The Mammoth Book of Native Americans* (Constable & Robinson, London, 2004) at 396.

⁹ WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) – Intellectual Property Needs and Expectations of Traditional Knowledge Holders (Genève, 2001) at 26.

¹⁰ WIPO uses the Black's Law Dictionary's definition of custodian as a "person or institution that has charge or custody (of a child, property, papers, or other valuables)". According to the same source, "custody" refers to the care and control of a thing or person for inspection, preservation, or security. A 'custodian' is defined in the Oxford English Dictionary as 'one who has the custody of a thing or person; a guardian, keeper'. The Merriam-Webster dictionary provides: 'one that guards and protects or maintains'. The term 'custodian' in the context of traditional knowledge and cultural expressions refers to those communities, peoples, individuals and other entities which, according to customary laws and other practices, maintain, use and develop the traditional knowledge and cultural expressions. It expresses a notion that is different from 'ownership', since it conveys a sense of responsibility to ensure that the traditional knowledge or cultural expressions are used in a way that is consistent with community values and customary law" see World Intellectual Property Organization (WIPO) *Glossary* electronic document <www.wipo.int/tk/en/resources/glossary.html#19> last visited on 16/12/2014.

peoples give to themselves and it is organised by community laws.¹¹ In rare cases, the guardians can be the totality of the tribe; normally they are selected members of the community, such as medicine men/women, elders, shamans or other chosen people with special attributes or line of descent. Whoever they are, they share a similar trait: they are the holders of knowledge that cannot be known by everybody else within the tribe or the region the clan inhabits.¹² Although they might be endorsed with property rights deriving from the complex customary laws of the community, outside their social structure, they are not recognised any Western-based property rights over the knowledge held in their custody (see chapters 9 and 10). Indigenous traditional holders (as per the above WIPO definition), on the other hand, are the keepers of a knowledge that is known by the whole indigenous community, but is unknown by Western people.¹³

As often happens, the struggle scholars face is essentially linguistic: indigenous peoples do not generally define themselves as holders or guardians. They have traditional definitions that describe the role everyone plays within the community; or they might use no definitions at all. Everyone within the community knows the role played by anyone else. It is important to stress this differentiation, because this thesis will mostly deal with the guardians as specific groups of people within the communities that have a 'duty of care' in relation to more or less sacred/secret forms of knowledge and the relative cultural expressions that derive/originate from such knowledge. The level of sacredness and secrecy of the knowledge and its management generally depends on the

¹¹ "... linked to a local or Indigenous community or other group of persons identifying with a traditional culture through a sense of custodianship, guardianship or cultural responsibility, such as a sense of obligation to preserve the knowledge, or a sense that to permit misappropriation or demeaning usage would be harmful or offensive, a relationship that may be expressed formally or informally by customary law" see WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2007) Doc WIPO/GRTKF/IC/11/9 at para 63.

¹² "Guardianship of specific types of traditional medicinal knowledge can vary widely. It may be carefully preserved within a family, known to specialized healers or to one gender, shared among community members, clans and tribes, or generally known in a regional context. In certain cases, as with many traditional healers in Sub Sahara Africa, this information is closely guarded because like trade secrets they are perceived as being valuable assets, which can assure a practitioner's livelihood. ... Elsewhere, knowledge of healing may be passed along through forms of apprenticeship or training to those expressing their willingness to utilize and/or practice it" see Memory Elvin-Lewis "Evolving Concepts Related to Achieving Benefit Sharing for Custodians of Traditional Knowledge" electronic document <<http://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/239/11547-3465-04075.pdf?sequence=4>> last visited on 15/12/2014.

¹³ Maatutua Declaration (1993) Article 2.1 – "Recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge".

internal traditions of each community and the set of customary laws/customs that regulate the transmission of the knowledge.

Among the peoples of the Sepik River (Papua New Guinea), for example, there are marked inequalities in ceremonial ranks. Such inequalities are of traditional descent, and are linked to magical and ritual prerogatives. Normally, the senior lineage of the clan inherits these powers.¹⁴ On the same line, and according to the first reports on encounters with Polynesian peoples, their general culture seemed to be well structured and organized. In 1879, Staniland Wake reported that the 'tapu'¹⁵ was "the great weapon of sovereign authority" among Polynesian people, and through it their lives were organized in complex political and social structures.¹⁶ Although each community manages its knowledge according to its internal customary laws, the role of guardians presents similarities among indigenous peoples that can be assessed in their generality.

4.1 - The Shared Values of the Indigenous Guardians of Knowledge

The Ancestral Beings recurring in the Australian Dreamtime traditions (which are broadly similar throughout Australia) named the places they journeyed and

¹⁴ "None of the cult rituals owned by Wuluwi-Nyawu or Nggela'angkw can take place without first being inaugurated by its owners' senior subclans. The ritually senior men of these subclans must give their consent before the ritual can be held, and they control the timing of all performances of cult ritual. Throughout the course of the rituals, the men of all the 'owner' subclans have many special responsibilities and entitlements; but these are rigidly graded in importance according to each subclan's order of ceremonial rank" see Simon J Harrison *Stealing People's Names* (Cambridge University Press, Cambridge, 1990) at 69.

¹⁵ "The term 'tapu' means 'forbidden or prohibited' and is still widely used in this sense today. Traditionally, however, its semantics included also, and essentially, 'sacredness' – a meaning that at first glance seems incompatible with our notion of prohibition. Something being *tapu* in the sense of 'forbidden' was rather a consequence of its being sacred, that is, loaded with the supernatural power *mana*. *Mana*, a core concept of Polynesian worldview, contained a broad spectrum of meanings: it implied or induced prestige, influence, supernatural power, or luck. It could be loaded like energy and was attributed to people, animals, things, or actions. With people, it was particularly the higher ranking who were endowed with *mana*. The contact between people of different rank was regarded as dangerous for both sides and therefore strictly regulated by avoidance rules, the *tapu*" see Andrea Bender and Sieghard Beller "Polynesian *tapu* in the 'deontic square': a cognitive concept, its linguistic expression and cultural context" in R Alterman and D Kirsh (eds) in *Proceedings of the Twenty-Fifth Annual Conference of the Cognitive Science Society* (NJ: Lawrence Erlbaum, Mahwah, 2003); "Tapu, tabu or kapu is a Polynesian traditional concept denoting something holy or sacred, with 'spiritual restriction' or 'implied prohibition'; it involves rules and prohibitions. The English word 'taboo' derives from this later meaning and dates from Captain James Cook's visit to Tonga in 1777. The concept exists in many societies, including traditional Fijian, Māori, Samoan, Rapanui, Tahitian, Hawaiian, and Tongan cultures – in most cases using a recognisably similar word—but in Rotuman term for this concept is 'ha'a'" electronic document <http://en.wikipedia.org/wiki/Tapu_%28Polynesian_culture%29> last visited on 21/04/2012.

¹⁶ For further information see C Staniland Wake "The Origin of the Classificatory System of relationships Used Among Primitive Peoples" (1879) 8 *The Journal of the Anthropological Institute of Great Britain and Ireland* 144 at 153.

created the nature that would characterize these places; they also created 'sacred rules' of human social life and indigenous culture. These Ancestral Beings¹⁷ entrusted custodianship of certain Australian territories to particular language groups, and the custodianship rights and duties of the chosen groups were normally regulated by the law.¹⁸ To understand the role of Aboriginal custodians, it is necessary to delve into the Dreamtime¹⁹ traditions of his people.

The essence of the Dreaming is that every part of the life force – the Ancestral Beings, the land, the sea, humans, fauna flora and natural phenomena – is inextricably and eternally connected to every other part.²⁰

It means that even the custodians are part of a whole with specific features regulated by sacred laws.²¹ Compared to Western religious beliefs, for Aborigines:

... the very land itself is a kind of 'church'; it is a kind of theophany where the land contains the essence of the Ancestors, and is the work of the Ancestors. The

¹⁷ "These dreaming characters who were responsible for the development of humanity were of many kinds and had widely differing personalities. They also came from many directions. Some came out of the unknown, whether or not it was named, some from the sky, and others out of the earth itself, emerging through an act of self-creation. And they came at different times, not all at once. There were many of them, all operating within the Dreaming; and they moved over the land, within particular areas, leaving tangible signs of their own physical presence there, becoming metamorphosed, turning into something else" see Ronald M Berndt and Catherine H Berndt *The Speaking Land – Myth and Story in Aboriginal Australia* (Inner Traditions International Ltd, Rochester-USA, 1994) at 15.

¹⁸ Stephanie Fryer-Smith *Aboriginal Benchbook for Western Australian Courts* (2002) Ch 2 at 2.2 electronic document <www.aija.org.au/online/ICABenchbook/Intro.pdf> last visited on 16/12/2014

¹⁹ "... a moral code that informs and unites all life. The dogma of Dreaming states that all of the world is known and can be classified within the taxonomy created by ancestral heroes whose pioneering travels gave form, shape, and meaning to the land" see Diane Bell "Living the Dreaming" in Steven J Friesen (ed) *Ancestors in Post-Contact Religion* (Harvard University Press, Cambridge-Massachusetts, 2001) at 177.

²⁰ Stephanie Fryer-Smith *Aboriginal Benchbook for Western Australian Courts* (2002) at 2.2.2.

²¹ "The Law known to Aboriginal peoples is inscribed in the land and encoded in the relationship that are testimony to the continuance of the Law. The law of Dreamtime binds people, flora, fauna, and natural phenomena into one enormous interfunctional world. It is the responsibility of the living, who trace direct relationships to these ancestors, to give form and substance to this heritage in their daily routines and their ceremonial practice: to keep the Law, to visit sites, to use the country, and to enjoy its bounty. It is in the living out of the Dreamtime heritage, particularly in the ceremonial domain, that we see how the past is negotiated in the present, how women and men position themselves vis à vis each other and vis à vis the Law. The common core of knowledge of the Dreamtime concerns knowledge of ancestral activity ..., the rights of living descendants, and the responsibilities of the ritual bosses of the business. It is through ceremonial activity that men and women give form to their distinctive interpretation of this heritage" see Steven J Friesen (ed) *Ancestors in Post-Contact Religion* (Harvard University Press, Cambridge-Massachusetts, 2001) at 180.

whole land is a religious sanctuary, with special regions throughout it that have acquired special sacred status.²²

Thus, in the traditions of Aborigines the relationship with the land is one of the most sacred and cherished aspects of their lives because it represents an important element for their survival.²³ Consequently, this special relationship between individuals or groups and the territory cannot be lost or exchanged. In this, the relationship between Aborigines and their territory is common to every member of the community with no exceptions. However, strongly defined roles regulate Aboriginal life. Elders, for example, are generally responsible for sacred objects, cultural matters and the performance of rituals. They are the custodians of the Law, who honour and maintain the Law and pass it to future generations. Thus, they are the ones deciding how culture can be used or preserved within the community. Indigenous social organization and kinship structures are regulated by customary Aboriginal Laws. Central to these Laws is “the responsibility to maintain culture as it has been set down in creation stories”.²⁴ Ceremonies and rituals maintain links to the Ancestral past and its stories;²⁵ the rules associated with these ceremonies are therefore very strict: “through ceremonies, participants as guardians of the story, bring the world into being through their bodies, songs and actions”.²⁶

²² Colin Dean *The Australian Aboriginal 'Dreamtime'* (Gamahucher Press, Geelong Victoria-Australia, 1996) at 2.

²³ “Land is vested in each member of the language group as a sacred bequest from the Dreaming, and thereby provides the foundation for the group’s existence. Each group’s territory is physically, spiritually, economically and culturally essential for survival” see Stephanie Fryer-Smith *Aboriginal Benchbook for Western Australian Courts* (2002) Ch 2 at 2.2.3.

²⁴ “The Law establishes a complex set of kinship and social arrangements that come with responsibilities and obligations’. For further information on the social organization of Aboriginal peoples” see Katja Mikhailovich and Alexandra Pavli *Freedom of Religion, Belief, and Indigenous Spirituality, Practice and Cultural Rights* (Centre of Education, Poverty and Social Inclusion - Faculty of Education, University of Canberra, 2006) at Ch 6.

²⁵ “Ceremonies may be associated with ancestral stories, rituals for increasing rain, plants and animal foods, fertility and initiation of young people into adulthood, or associated with deaths and burial. Some rituals and ceremony are restricted to women or men only and may be secret/sacred while others are public. Rituals may be practiced during ceremonies that last for days or weeks, with singing and dancing, storytelling, and the display of body decoration and ceremonial objects. During these ceremonies, the stories connected to the Ancestral Beings are told and retold” see Katja Mikhailovich and Alexandra Pavli *Freedom of Religion, Belief, and Indigenous Spirituality, Practice and Cultural Rights* at Ch 7.

²⁶ Commonwealth of Australia, Department of Environment, Heritage and Arts, *Uluru Visitor Guide 2009* electronic document <www.environment.gov.au/parks/publications/uluru/visitor-guide.html> last visited on 25/04/2012.

In the past it was often believed that women did not perform significant roles within the clan. It is generally known that, for example, among the Yolngu people, women's acquisition of knowledge "follows a pattern similar to that of men, though ... they are less likely to have the opportunity to exercise rights in sacred law". In Yolngu tradition, women do not go through "the same stages of initiation as men" and are "seldom called upon to exercise rights in religious knowledge in public".²⁷ However, most recent studies have shown that women are the guardians of the feminine line of transmission and have control over other sacred associations connected to a sacred ritual. Their role is less ceremonial and more secular, and it is organised by a different set of customary laws.²⁸ In the case of the Yolngu peoples, women are the owners of the Djungguwan ceremony²⁹ and have a major role in organising the public phases of the ritual.³⁰ In general, among Yolngu peoples, the 'revelation' of the most sacred objects of the clan and their utilisation is limited to the most senior male members of the clan, as well as the senior initiated.³¹ In the specific, knowledge, art and artistic expressions are regulated by a hierarchy of ritual authority, which have the power to restrict access to the knowledge – "who can visit certain places is restricted. Who can touch certain objects or take part in particular phases of a ceremony is restricted".³² Knowledge is divided into public and confidential; with the first being the knowledge accessible by the whole community and the second restricted to male elders who act as the custodians of the line of transmission. In this case, secrecy is what "marks the division between inside and outside knowledge and creates pauses in the transmission of knowledge".³³ Art, sacred objects and paintings are fundamental elements of

²⁷ Howard Morphy *Ancestral Connections – Art and an Aboriginal System of Knowledge* (The University of Chicago Press, Chicago and London, 1991) at 59; see also William H Edwards (ed) *Traditional Aboriginal Society* (MacMillan, Melbourne, 1987).

²⁸ For further readings on Aboriginal women see William H Edwards (ed) *Traditional Aboriginal Society* at 237.

²⁹ "The Djungguwan is a ceremony of the Rirratjingu and the Marrakulu clans. It is a ceremony of transition, teaching and remembering. It is an initiation ceremony that aims to teach young boys about discipline, law and respect for the traditions of their people. Through song, dance and art, a narrative is told about two ancestral beings, the Wawilak Sisters, as they journey through country creating each tribe and clan and giving them their law" see electronic document <http://filmaustraliaceremony.com.au/s3_1.htm> last visited on 25/04/2012.

³⁰ See Morphy *Ancestral Connections – Art and an Aboriginal System of Knowledge* at 88.

³¹ At 59.

³² At 76.

³³ See Morphy at 95.

Aborigines' lives; they are the manifestations of the Ancestral Beings. The guardians control the rights to the utilization of the designs and objects, to make sure nobody steals them, or uses them inappropriately. By protecting the sacred laws that are symbolised in their art, the custodians fulfil their obligations to the tribe and the Ancestors who have entrusted them with the knowledge and the land from which they took the knowledge.³⁴ It is the line of knowledge with the past that must be safeguarded to make sure that it will continue to sustain indigenous life and keep the line uncorrupted. Often, within indigenous communities, the guardians constitute a distinct group that can go under the name of the tribe and being generically identified as the 'elders' of the clan, or they can have a traditional name to describe their role. Specificity is not always required, because the community knows well who the 'custodians' of the knowledge are and the strict laws regulate their role. In her report *Our Culture, Our Future*, Terry Janke explains that:³⁵

Although Indigenous Cultural and Intellectual Property is collectively owned, an individual or group is often the custodian or caretaker of a particular item of heritage. The traditional custodians are empowered as caretakers in relation to the particular item of heritage only in so far as their actions conform to the best interests of the community as a whole.

In general, within indigenous communities, similar customary laws regulate the practice of custodianship among Native Americans. The Medicine Lodge's group represents an example of guardianship. Originating among the Algonquin tribe, and later extending to the Sioux of the Mississippi Valley, the Lodge was:

... a union of affiliation of a number of lodges, each with its distinctive songs and medicines. Leadership was in order of seniority in degrees, which could only be

³⁴ William H Edwards (ed) *Traditional Aboriginal Society* (MacMillan, Melbourne, 1987) at 21.

³⁵ Terri Janke *Our Culture, Our Future* Report Prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission at 8 electronic document <<http://frankellawyers.com.au/media/report/culture.pdf>> last visited on 25/04/2012.

obtained by merit, and women were admitted to membership upon equal terms, with possibility of attaining to the highest honours.³⁶

In these gatherings the use of curative medicines were taught and practiced mainly by the eldest of the clan, and its younger members were trained to fill the places of those that would eventually pass away.³⁷

In many African societies, like the Hausa community for example, women are the guardians of traditional knowledge. They pass on their knowledge through storytelling, riddles, proverbs, and idioms.³⁸ They also use rituals and religious practices to pass on the values considered “essential in understanding and experiencing the fullness of life”.³⁹ In Africa, “individual elders may preserve knowledge for the community and various members share knowledge while specific elders from the community remain its custodians”.⁴⁰ The knowledge is stored in the guardians’ minds along with the instructions on how and where to use it. It is intangible and often rests hidden in the colours of indigenous languages and traditions. As such, the sacred knowledge does not need to be defined, and it is never considered a commodity by those, within the tribe, who are guided by traditions and customary laws.⁴¹ In the interpretation of what

³⁶ Jon E Lewis (ed) *The Mammoth Book of Native Americans* (Constable & Robinson, London, 2004) at 383 and 385

³⁷ “A medicine or ‘mystery feast’ was not a public affair, as members only were eligible, and upon these occasions all the ‘medicine bags’ and totems of the various lodges were displayed and their peculiar ‘medicine songs’ were sung. ... The ‘Grand Medicine Dance’ was given on the occasion of initiating those candidates who had finished their probation, a sufficient number of whom were designated to take the place of those who had died since the last meeting ... After silent prayer, each medicine-man in turn addressed himself to his charge, exhorting him to observe all the rules of the order under the eye of the Mysterious One, and instructing him in his duty toward his fellow-man and toward the Ruler of Life”; for further details on the Great Medicine Lodge see Jon E Lewis (ed) *The Mammoth Book of Native Americans* at 384.

³⁸ “Most African societies acknowledge the fact that oral traditional teachings facilitate the inculcation of socially desirable values such as hard work, honesty, thrift, and wisdom” see Njoki Nathami Wane “Mapping the Field of Indigenous Knowledges in Anti-colonial Discourse: A Transformative Journey in Education” (2008) 11 2 *Race Ethnicity and Education* 183 at 186.

³⁹ Supra at 190.

⁴⁰ A Agrawal “Neither Having One’s Cake, Nor Eating It: Intellectual Property Rights and ‘Indigenous Knowledge’” (1995) 3 3 *Common Property Resources*.

⁴¹ Muchae, for example, reports how in Kenya “among the members of the Kikuyu community, indigenous knowledge in some fields was a well-guarded secret. For instance a person who had acquired special skills as a black smith would not allow just anybody to walk into his workshop and watch him make such instruments as spears, pangas, diggings hoes, etc. The skills of making such instruments were carefully guarded. Such a person would only train his son or a very close relative. The same case applied to herbalists. An intruder was always heavily fined in order to deter any attempt to steal such knowledge. The problem with this type of system is that such important knowledge was owned by and confined to a few family members and rapid development on innovations was hampered by secrecy” see John Muchae *Indigenous*

indigenous knowledge might be, the confusion is essentially ours. We, the Westerners, need to define and place every phenomenon within a linguistic framework that has often meaning only for us and, especially in the case of indigenous peoples, might mean nothing at all to them.

The mission of guardians and custodians is to make sure that the line of knowledge stays unbroken and uncorrupted within the indigenous society and is safely passed to future generations. The corruption of a knowledge, which holds sacred, ancestral power, could have dramatic consequences for the rest of the community. Guardians are what in modern language is translated into the idiom: 'facilitators'. They are the chosen ones who, because of their special training, spiritual predispositions and legacy, can handle the sacred and what comes with the knowledge of it, and can filter its power into knowledge that is comprehensible and non-harmful for the rest of the community. For indigenous peoples the misuse of the sacred can bring destruction and despair, and not everyone can have access to the ultimate knowledge. It is not by chance, therefore, that guardianship is often bound to religious and spiritual practices, and sacredness and secrecy are the recognisable features of the selected members of the group of guardians/custodians. Within indigenous tribes, secrecy normally generates:

... a social hierarchy' between those who know and those who do not. In absence of significant social and economic stratification, "the social ranking fostered by ritual secrecy may anchor existing patterns of leadership"; which means that 'a breakdown of secrecy threatens traditional patterns of political and religious life.'⁴²

In his book *Who Owns Native Culture?*, Brown points out that within Hopi society, for example:⁴³

Knowledge and Industry Property Rights: Kenyan Experience (Inter-Regional Workshop on intellectual Property Rights in the Context of Traditional Medicine, Bangkok, 2000).

⁴² Michael F Brown *Who Owns Native Culture?* (Harvard University Press, Cambridge-Massachusetts, 2003) at 30.

⁴³ See Brown at 13.

... religious knowledge is rigorously compartmentalized among a range of specialized organizations. Community values discourage curiosity about the details of ritual in which one is not a direct participant.

While in Australia, under Aboriginal law:

... the right to create artworks depicting creation and dreaming stories, and to use pre-existing designs and totems of the clan, resides with the traditional owners as custodians of the images. The traditional owners have the collective authority to determine whether these images may be used in an artwork, by whom the artwork may be created, by whom it may be published, and the terms, if any, on which the artwork may be reproduced.⁴⁴

Under Aboriginal customary law a story or a design must be reproduced with the permission of the traditional custodians (or owners),⁴⁵ and the granting of the concession depends upon “the subject matter of the work”.⁴⁶ In the Australian case *Bulun Bulun & Anor v R & T Textiles Pty Ltd*⁴⁷ the bark painting of Mr Bulun Bulun (*Magpie Geese and Water Lilies at the Waterhole*) was created “in accordance with the traditional laws and customs of the Ganalbingu people”. According to Janke, the case does not refer to traditional holders, but it suggests that the authorization for the creation of the artwork comes from the *Ganalbingu* elders.⁴⁸ In another famous Australian case - *Milpururru and Others*

⁴⁴ “Aboriginal artwork will often depict secret parts of a dreaming that will only be recognised and understood by those who are initiated into the relevant ceremonies, or at least have a close knowledge of the cultural significance of the story” see Terri Janke *Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO, Genève, 2003) at 14.

⁴⁵ “If permission has been given by the traditional owners to a particular artist to create a picture of the dreaming, and that artwork is inappropriately used or reproduced by a third party, the artist is held responsible for the breach which has occurred, even if the artist had no control over or no knowledge of what occurred” see *M*, Payunka, Marika & Others v Indofurn Pty Ltd and Others* [1993] 130 ALR 659 at 663.

⁴⁶ “... an artwork that is associated with a public story or ceremony might have fewer restrictions that an artwork that embodies a dreaming or creation story. Aboriginal artwork will often depict secret parts of a dreaming that will only be recognised and understood by those who are initiated into the relevant ceremonies, or at least, have a close knowledge of the cultural significance of the story” see Terri Janke *Minding Culture – Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO, Genève, 2003) at 14.

⁴⁷ *Bulun Bulun Case: John Bulun Bulun & Anor v R & T Textiles Pty Ltd* [1998] IndigLawB 87; (1998) 4(16) Indigenous Law Bulletin at 24.

⁴⁸ “The Ganalbingu people are the traditional Aboriginal owners of the Ganalbingu country. ... It is pleaded that the traditional owners of the Ganalbingu country comprise: (i) Members of the Ganalbingu People, (ii) The Yolngu People (Aboriginal people of the Arnhem Land) who are the children of the women of the Ganalbingu People, (iii) the Yolngu People who stand in a relationship of mother’s-mother to the members of the Ganalbingu law and custom, (iv) such other Yolngu People who are recognised by the applicants

v Indofurn Pty Ltd and Others (1993),⁴⁹ on the other hand, it is clearly stated that the traditional custodians and artists (and not the whole indigenous community) consent to reproduce artistic works of special significance for the community when the reproductions are meant to be placed in prestigious institutions such as museums, or published in educational publications.⁵⁰ Ms Banduck Marika, one of the artists involved in the claim concerning the unauthorised reproduction of traditional images belonging to the Rirratingo clan (in the Northern Territories of Australia), explained how distressing it was to see the unauthorised reproduction of sacred designs on rugs; how she feared to be held responsible for the reproduction and misuse of the sacred knowledge, and how the consequent exclusion from the trust of the clan could badly affect her livelihood within her people.⁵¹ According to Banduk Marika, in the past there were very severe consequences for misuse of artwork without permission. The consequences could also involve death sentences.⁵² Even the mere reproduction of artworks and traditional designs can hold a special significance for Aborigines, and its reproduction is generally strictly controlled by the tribe. In his judgement, Justice Van Doussa explained how:⁵³

Sacred ceremonies generally restricted to the initiated of the tribe or those undergoing initiation, and their related celebrations in dance, song and design, form the basis of what might seem nothing more than complex abstract patterns in the paintings. The patterns in fact represent explicit visual descriptions, stylised maps of identifiable locations and myths ... the paintings are eloquent witnesses to the rich and enduring nature of Aboriginal culture. ... The right to

according to ganalbingu law and custom as being traditional Aboriginal owners of Ganabingu country. ... Mr Milpurrruru is the most senior person of all the Ganabingu People. The Ganabingu People are divided into 'top' and 'bottom' people, as is the Ganabingu country. Mr Milpurrruru is a 'top' Ganabingu. Mr Bulun Bulun is the most senior person of the "bottom" Ganabingu and second in line to Mr Milpurrruru of the Ganabingu People generally" see *Bulun Bulun & Anor v R & T Textiles Pty Ltd case*.

⁴⁹ *Milpurrruru and Others v Indofurn Pty Ltd and Others* [1994] 130 ALR 659.

⁵⁰ See *Milpurrruru and Others v Indofurn Pty Ltd and Others* [1994] 130 ALR 659 at 662.

⁵¹ "... I fear that my family and others may accuse me of giving permission for the reproduction behind her backs without consulting and seeking permission in the manner required by our law and culture. I fear that this could result in my family and others deciding that I cannot be trusted to use important images such as this one anymore" see Terri Janke *Minding Culture – Case Studies on Intellectual Property and Traditional Cultural Expressions* at 14.

⁵² Fortunately, nowadays the clan generally chooses different kinds of punishments, including refusing participation in ceremonies, or the removal of the "right to reproduce designs or any other story of the clan" see *M*, Payunka, Marika & Others v Indofurn Pty Ltd and Others* [1993] 130 ALR 659 at 663.

⁵³ *Milpurrruru and Others v Indofurn Pty Ltd and Others* [1993] 130 ALR 659 at 662.

create paintings and other artworks depicting creation and dreaming stories, and to use pre-existing designs and well-recognised totems of the clan, resides in the traditional owners (or custodians) of the stories or images. Usually that right will not be with only one person, but with a group of people who together have the authority to determine whether the story and images may be used in an artwork

The transmission of knowledge depends on tribal traditions and customs that regulate it. Wherever there is a transmission of the knowledge that is not supposed to be known by the whole clan, there exists an element of custodianship, regardless of the fact that tribal customs define or regulate it or not. Specialists of practices (mostly religious) are custodians of the ritual practices and the objects used during the ceremonies, and often control the transmission of the knowledge.

WIPO suggests that now more than ever before, traditional knowledge holders and guardians sit between a customary system that initiated their role and still regulates their activity within the community, and a formal Intellectual Property (IP) system “administered by governments and inter-governmental organizations such as WIPO” itself.⁵⁴ Consequently, while the holders are situated within their traditional system, they also increasingly interact, sometimes forcibly, with a Western-framed IP system, whose aim is rarely focused on the safeguard of holders’ interests among the interests of the property market at large. In the modern era, indigenous peoples are encouraged to neglect their internal system of customary laws, and use the IP domain as a defensive mechanism. In theory, the shift from customary laws to the IP system would be admissible if IP laws were inclusive of indigenous peoples’ cultural expressions and culture. Unfortunately, this is not the case yet. Not only are IP laws not inclusive of indigenous holistic approach to culture, but under the threat of losing their traditional practices, often ‘stolen’ by governments and private enterprises, indigenous guardians frequently lose their battles for the simple reason that they are alien to the rules that govern such battles.

⁵⁴ *M*, Payunka, Marika & Others v Indofurn Pty Ltd and Others* [1993] 130 ALR 659 at 29

4.2 - Guardianship at the Time of Colonization and Today

Traditionally, the early documents circulating in Europe that described indigenous peoples' customs were, for the most part, collected by missionaries and occasional travellers who came into contact with indigenous tribes during colonization time. Highly unprepared for these encounters, missionaries had no previous experience of 'indigeneity',⁵⁵ and were often responsible for the misrepresentation of indigenous life and the consequent degradation of indigenous culture. Wrong assumptions about indigenous customs spread in the Western world and influenced any future misinterpretation of the way of living of indigenous peoples, justifying the idea of European superiority, discrimination and racism. Moved by the obsessive quest for evangelization and greed, Western missionaries were often responsible for the appropriation and repression of native practices. The traditional role of the guardians, shamans, healers and visionaries that had traditionally played a role of fundamental importance within the clan or tribe was, therefore, discouraged or banned. To 'break the spirit' of the tribes from within, missionaries delegitimized the role of the elders and elevated their protégées to temporal power; such imposition aimed at weakening and dismembering the native society⁵⁶ and facilitated the assimilation process. Whilst it might be argued that history is full of the work of 'good' missionaries who, especially in south and central America and Asia, risked their lives to protect their communities from colonizers,⁵⁷ it is generally known that the approach missionaries had towards indigenous peoples was to assimilate

⁵⁵ "At worst, missionaries consciously opened paths for traders, raiders and other colonisers to follow, and which have led to the extermination of aboriginal peoples. At best, they elevated the 'savage' into a new, purer kind of being Across the middle ground, however, missionaries were usually bigoted, venal and often treacherous. They protected their wards from the most vicious impacts of colonization, only to ensnare them with materialism, facilitate the robbery of their natural resources, exploit their labour, divide their families, remove their children and degrade their culture" see Roger Moody (ed) *The Indigenous Voice* (International Books, Utrecht, 1988) at 243.

⁵⁶ "In Tapuruquara, before the missionaries came, there were many Indians. ... Then the missionaries came and began to change the lives of Indians, interfering in their customs and religion. Then the priests said that our most important ritual was no good, and they tried to force us was no good, and they tried to force the man to play to play the sacred trumpets that were used in the Dabukuri in the church in front of everyone – women, children, priests. Women and children are not allowed to see these trumpets – if a woman saw them, in the old days, she was killed" (Tariano Indian, Rio Negro, Brazil). "... the missions kill us from within, because they forget our traditions, culture and religion. They impose upon us another religion, belittling the values we hold. This decharacterizes us to the point where we are ashamed to be Indians" (Daniel Cabixi, Pareci Indian, Brazil), documents from secondary source by Roger Moody (ed) *The Indigenous Voice* at 248.

⁵⁷ See Moody at 244.

them and, in order to do so, they needed to convert them, sometimes resorting to force, to the Christian belief.⁵⁸ Any knowledge initially acquired by colonizers was intended to be used to weaken or neutralize indigenous inhabitants. Colonizers ignored the pre-existence of hierarchical structures within the tribes, unless that information was strategically important to succeed in their assimilationist practices. The early documents ignore the role of the guardians, to focus on the role of 'kings' and 'queens' or other 'special' members of the tribe who dressed and acted differently from the rest of the community. Since the role of the guardians was sacred and secret, it was, in fact, impossible for the strangers to observe or join in the sacred rituals performed by the elders and understand the intrinsic spiritual value the ceremonies had for the community. Even today it is still difficult to find authentic, accurate and realistic representation of what indigenous peoples' traditions used to be before their cultural corruption. Undeniably, even if strangers were invited to participate in the rituals, they did not have the cultural and technical resources to comprehend the holistic way of living of indigenous inhabitants. Totally unaware of their ignorance, and strong in their arrogance, new settlers tended to distort everything they saw.⁵⁹ In this scenario, custodians had the duty to preserve intact the connection between the Great Spirit and society. They were the only link between the Sacred and the community, and their decisions were induced by the Spirits of creation or the Spirit of the ancestors. Whatever the Spirit said would be heard by the custodians and, when required, translated into action. The introduction of the Ghost Dance among Indian Nations is an example of the work of the custodians of knowledge at the time of colonization. During sacred ceremonies, shamans were told to perform this specific ceremony to welcome

⁵⁸ "The more conservative missionaries believed that the Aborigines were pagans who had to be quickly converted to Christianity and that all Aboriginal culture should be swept away" see Richard Broome *Aboriginal Australians* (3rd ed, Southwood Press, Sydney, 2001) at 113.

⁵⁹ In his book *Disciplining the Savages, Savaging the Disciplines* Martin Nakata discusses the role of missionaries in Australia and argues that the missionaries' view was indeed lacking in cognitive resources to comprehend indigenous peoples; he also stresses how this distorted idea of indigenous peoples was a crucial factor that determined, and justified, the segregationist practices put into place by many missionaries, who missed completely the complexity of indigenous lives, and created prejudicial descriptions of indigenous peoples (defined lost souls, cannibals or noble savages) that no Australian Islanders would have given to himself. See Martin Nakata *Disciplining the Savages, Savaging the Disciplines* (Aboriginal Study Press, Australia, 2007) at 27.

the return of the buffalo in native lands and resist invasion (see footnote).⁶⁰ During colonization, the primary approach travellers had in the new lands was visual observation;⁶¹ they observed everything they believed important and reported their observations in diaries, letters and other documents that would be afterwards handed to their governments. This because the main focus of colonizers was the acquisition of new lands, regardless of the people inhabiting those lands. Thus, the early documents collected were reports that, in most cases, show very little understanding of and interest in the complex social structure of indigenous peoples' communities.⁶² After Europeans had settled in the new lands, many rituals performed by indigenous peoples were forbidden for religious reasons (especially in the Americas) and discontinued. Some of the rituals were re-established after many years, and yet it is difficult to determine if the line of transmission safeguarded by the custodians had remained authentic during the period of suspension.⁶³ In some cases, indigenous peoples are the first

⁶⁰ "... There were many shaman dreamers (among Indians), but the most powerful was the Paiute Wovoka. Just before dawn on New Year's Day, 1889, far out in remote Nevada, the 34-year-old Wovoka fell ill. In his delirium he dreamed he visited the Great Spirit in heaven. There, he was told that a time was coming when the buffalo would once again fill the plains and dead tribesmen would be restored to their families. If the Indians refrained from violence, and if they were virtuous and performed the proper ritual dance – the Ghost Dance – they could hasten the coming of the new world, which would cover the old, and push the White man into the sea. ... The Sioux began Ghost Dancing in the spring, in secret ceremonies away from White Eyes" see Jon E Lewis (ed) *The Mammoth Book of Native Americans* at 299-300.

⁶¹ "The method of observation has a sure procedure; it gathers facts to compare them, and compares them to know them better. The natural sciences are in a way no more than a series of comparisons. As each particular phenomenon is ordinarily the result of the combined action of several causes, it would be only a deep mystery for us if we considered it on its own: but if it is compared with analogous phenomena, they throw light each on the other. The particular action of each cause we see as distinct and independent, and general laws are the result. Good observation requires analysis; now, one carries out analysis in philosophy by comparisons, as in chemistry by the play of chemical affinities" see Joseph-Marie Degérando "The Observation of Savage People" in Antonius CGM Robben and Jeffrey A Sluka (eds) *Ethnographic Fieldwork: An Anthropological Reader* (2nd ed, Wiley-Blackwell, 2011) at 57.

⁶² According to Degérando, for example, "the first fault that we notice in the observations of explorers on savages is their incompleteness; it was only to be expected, given the shortness of their stay, the division of their attention, and the absence of any regular tabulation of their findings. Sometimes, confining themselves to the study of some isolated individuals, they have given us no information on their social condition, and have thus deprived us of the means of estimating the influence which these social relations might have on individual faculties. Sometimes, pausing on the smallest details of the physical life of the savages, they have given us scarcely any details of their moral customs. Sometimes, describing the customs of grown men, they have failed to find out about the kind of education received in childhood and youth: and above all, pre-occupied almost entirely with the external and overt characteristics of a people, of its ceremonies and of its dress, they have generally taken too little care to be initiated in the far more important circumstances of its theoretical life, of its needs, its ideas, its passions, its knowledge, its laws. They have described forms rather than given instructive reports; they have marked certain effects, and explained scarcely any causes" see Joseph-Marie Degérando "The Observation of Savage People" in Antonius CGM Robben and Jeffrey A Sluka (eds) *Ethnographic Fieldwork: An Anthropological Reader* (2nd ed, Wiley-Blackwell, 2011) at 58.

⁶³ "While missionaries often forcefully imposed Christianity on Indigenous people, responses to Christianity varied greatly, including ambivalence, rejection or enthusiastic acceptance. Traditional Indigenous spiritual/religious beliefs and practice have persisted to the present, and are sometimes combined with

to question the authenticity of their own traditional practices. Indeed, during colonization many indigenous communities all over the world had accepted and married Western habits and mixed them with their traditional way of living, giving birth to a parallel 'cultural hybridity'. This process was mainly due to curiosity and desperation. Better to hide and thus safeguard indigenous traditions into newly imposed beliefs and symbolism, than lose their heritage during forced assimilation. Since the knowledge held by guardians is mostly secret, it is incredibly difficult, if not impossible, to address how much of it has been maintained or whether the custodians decided to discontinue it to protect it. Even the guardians of today might have difficulty to determine if the knowledge they hold and protect is the one that originated during the creation time. Whatever was left of the most sacred traditions was often preserved in total secrecy by the guardians. Secrecy, therefore, became the ultimate form of protection of indigenous heritage. The large use of secrecy happened because indigenous peoples never considered their sacred knowledge as the 'heritage of humankind'⁶⁴ and therefore did not intend to disclose its content to strangers, or have it exploited by the public at large. Moreover, the diffusion of the knowledge could bring great harm to the members of the community who were kept away from the knowledge for their own protection. In some cases, the knowledge itself needs to be protected from the members of the community to avoid any internal corruption and exploitation of the knowledge. Truly, the duty of care of guardians is both to protect the knowledge and the people separately, and the knowledge from the people of the community. While most of the exploitation of indigenous cultures comes from outside, it is known that it may also be caused by internal factors. Sometimes, indigenous members themselves, for different reasons such as financial gain, might try to exploit the knowledge in the custody of the guardians or the community.

other religious traditions" see Katja Mikhailovich and Alexandra Pavli *Freedom of Religion, Belief, and Indigenous Spirituality, Practice and Cultural Rights*, by the Centre for Education, Poverty and Social Inclusion, Faculty of Education, University of Canberra (2011) at Introduction.

⁶⁴ For further information on the subject, see Ana Filipa Vrdoljak *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press, Cambridge, 2008).

Customary laws exist to prevent the internal and external corruption of the knowledge. The factors determining the creation and enforcement of customary laws safeguarding sacred traditional knowledge varied on a case by case and region by region basis.⁶⁵

The next section will explain what customary laws are and how they differ from the Western legal system. This is important in order to comprehend the understanding indigenous peoples have of the law, and how they use it to protect their sacred/secret culture guarded by the custodians.

4.3 - Indigenous Customary Laws: The Regulators of the Guardianship

In Bennet's words:⁶⁶

... customary law grows out of the social practices which a given jural community has come to accept as obligatory. It is a pervasive normative order, providing the regulatory framework for spheres of human activity as diverse as family, the neighbourhood, the business of merchant banking, or international diplomacy. Customary law is often unwritten. It is then a matter of oral history and ritualized activity.

It is a complex system of unwritten law (*lex non scripta*) which applies to a group that shares:

... a common linking factor such as nationality, religion, ethnicity, occupation, locality, or family. Of course, over the years, the unwritten corpus of customary law might have been codified in written form, or documented in scholarly works. Traditionally, guardianship is regulated by indigenous customary laws. Being structured into organized societies, indigenous peoples have always had their own laws and procedures for protecting their culture and 'determining when

⁶⁵ In Australia, for example, "... some Aboriginal people rejected Christianity and maintained their own traditional practice and belief. Many others took the new and combined it with it with their traditional knowledge and spiritual practice syncretising beliefs" see Katja Mikhailovich and Alexandra Pavli *Freedom of Religion, Belief, and Indigenous Spirituality, Practice and Cultural Rights*, by the Centre for Education, Poverty and Social Inclusion, Faculty of Education, University of Canberra (2011).

⁶⁶ See TW Bennet "Comparative Law and African Customary Law" in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2008) at 642.

and with whom their heritage can be shared.⁶⁷

In Dutfield's words, customs are, in fact:⁶⁸

... established modes of behaviour within a cultural community that may have the force of law. Customary norms and rules exist in all cultures, although not all cultural communities have dedicated judicial institutions to enforce them and to resolve disputes.

Compared to the law, which is based on a tradition of documented case law arguments, customary laws are unwritten and do not constitute a subject for legal specialists. They are part of everyday life. Therefore, in customary law there is a great component of spiritual laws and common sense. As such, an indigenous law system can be regarded as:

... a 'living law', a law activated and modified not by specialised practitioners but by those who in their daily lives, practice the law, living out of their traditional customs in everyday contacts – and occasional confrontation with neighbours, rivals, partners, relatives.⁶⁹

In her report for the UN Commission on Human Rights, Daes describes indigenous customary laws as a complex set of rules which "vary greatly among different indigenous peoples".⁷⁰ Daes studied indigenous peoples thoroughly and, from her experience, she confirmed the impossibility to describe the rules forming the customary body of laws of indigenous communities because: first the rules vary, often substantially, from one indigenous society to another; and

⁶⁷ Erica-Irene Daes Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations' Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities (28 July 1993) Doc E/CN.4/Sub.2/1993/28 at para 27.

⁶⁸ Graham Dutfield *Protecting Traditional Knowledge: Pathways to The Future* (International Centre for Trade and Sustainable Development (ICTSD), Genève, 2006) at 37.

⁶⁹ For further info see Leon Sheleff *The Future of Tradition: Customary Law, Common Law, and Legal Pluralism* (Frank Cass, London and Portland, 1999).

⁷⁰ Erica-Irene Daes Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations' Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities (28 July 1993) Doc E/CN.4/Sub.2/1993/28 at para 27.

secondly because “each indigenous people must remain free to interpret its own system of laws, as it understands them”.⁷¹ However Daes also recognized similar traits in indigenous customary laws that could be effectively summarized into:⁷²

Heritage is ordinarily a communal right, and is associated with a family, clan, tribe or other kinship group. Only the group as a whole can consent to the sharing of heritage, and its consent must be given through specific decision-making procedures, which may differ depending on whether songs, stories, medicines or some other aspect of heritage is involved. In whatever way consent is given, it is always temporary and revocable: heritage can never be alienated, surrendered or sold, except for conditional use. Sharing therefore creates a relationship between the givers and receivers of knowledge. The givers retain the authority to ensure that knowledge is used properly and the receivers continue to recognize and repay the gift.

In her observations of the indigenous world, she also identified the role of the guardians, how custodianship works and what rights the custodians normally have within the community. She wrote that:⁷³

Although heritage is communal, there is usually an individual who can best be described as a custodian or caretaker of each song, story, name, medicine, sacred place and other aspect of a people’s heritage. Such individual responsibilities should not be confused with ownership or property rights. Traditional custodians serve as trustees for the interests of the community as a whole and they enjoy their privileges and status in this respect for only so long as they continue to act in the best interests of the community.

Today WIPO defines indigenous customary laws as:⁷⁴

⁷¹ Daes *supra*.

⁷² See Daes at para 28.

⁷³ See Daes at para 29

⁷⁴ ‘Approaches to defining or characterising “customary law” typically make some reference to an established pattern within a community which is seen by the community itself as having a binding quality. For instance, customary laws are defined variously by some authorities as • “customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws”, and • “established patterns of behaviour that can be objectively verified within a particular social setting. The modern codification of civil law developed out of the customs, or costumes of the middle ages, expressions of law that developed in particular communities and slowly collected and written down by local jurists. Such customs acquired the

... intrinsic to the life and custom of indigenous peoples and local communities. What has the status of “custom” and what amounts to “customary law” as such will depend very much on how indigenous peoples and local communities themselves perceive these questions, and on how they function as indigenous peoples and local communities.

In general, the custodians have the collective authority to determine how the knowledge can be used, and in which ‘form’ the knowledge can be translated (song, painting, story, medicine etc). According to indigenous customary laws, the extent to which the knowledge can be reproduced depends on the sacredness of the knowledge itself, in which type of reproduction it is supposed to be translated into, and what use (cultural, educational, commercial etc) will be done of the reproduction. Only those who are initiated to the secret parts of the knowledge are able to manage it. In this context, traditional knowledge, and particularly sacred traditional knowledge, can be primarily understood from the point of view of the communities concerned, and in the context of the traditional life of the community. The Secretariat of WIPO’s Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (IGC) confirms that many traditional societies like the indigenous ones have developed “highly sophisticated and effective customary intellectual property systems” that have remained invisible when compared to the official intellectual property system. Given the fact that customary laws have been effectively and tactically neglected for such a long time, IGC suggests that there is today a growing interest in studying “the relationship between customary protection of traditional knowledge and the intellectual property system”.⁷⁵ On the same line, the World Bank stresses that any discourse on traditional knowledge should be included in the broader concept of cultural pluralism. The world has never been organized into the European systems of knowledge. The

force of law when they became the undisputed rule by which certain entitlements (rights) or obligations were regulated between members of a community” see WIPO Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Thesis (2013) at 2 electronic document <www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf> last visited on 22/02/2017

⁷⁵ WIPO IGC Annual Report (2001) at para 68.

fact that Europe considered itself to be the leader of the world, politically, culturally, economically and legally, does not change that, since time immemorial, the world has been inhabited by different societies with very distinctive cultures and customary laws. Indigenous culture and heritage is not just a different kind of intellectual property, but an entirely different entity born in environments totally different from the European one (see chapter 2). In this context, it is correct to say that Western laws are not inclusive of indigenous customary law systems, while it is also true that living indigenous customary laws are not inclusive of Western laws. This means that in our globalized world there are no existing regulations that are reflective and inclusive of all cultural diversities. Only a legally diverse system flexible enough to include the diversities of the world could accommodate all the needs of different societies, including those inhabiting remote areas of the world. Indeed, there are notable and marked differences between indigenous customary laws and the Western legal system deriving from common law.

INDIGENOUS CUSTOMARY LAWS	NON INDIGENOUS LAWS
<ul style="list-style-type: none"> ▪ Generally orally transmitted 	<ul style="list-style-type: none"> ▪ Emphasis on material form
<ul style="list-style-type: none"> ▪ Emphasis on perpetual preservation and maintenance of culture 	<ul style="list-style-type: none"> ▪ Limited in time
<ul style="list-style-type: none"> ▪ Socially based; transmitted from one generation to another 	<ul style="list-style-type: none"> ▪ Individually based – created by individuals or group of individuals
<ul style="list-style-type: none"> ▪ Generally non transferable, but transmission when allowed, is based on sacred and cultural qualifications belonging to few chosen custodians 	<ul style="list-style-type: none"> ▪ Intellectual property can be freely transmitted and assigned – usually for economic returns, for limited time, in any medium and territory
<ul style="list-style-type: none"> ▪ Severe restrictions on how transmission can occur especially in relation to sacred/secret knowledge 	<ul style="list-style-type: none"> ▪ Intellectual property holders can freely dispose on how and by whom the information can be transmitted, transferred or assigned
<ul style="list-style-type: none"> ▪ All aspects of cultural heritage are holistically interrelated 	<ul style="list-style-type: none"> ▪ Intellectual property are generally compartmentalized categories eg tangible vs intangible
<ul style="list-style-type: none"> ▪ Community owned, but guardians manage its 	<ul style="list-style-type: none"> ▪ Intellectual property rights are owned by individual creators

transmission and dissemination	
<ul style="list-style-type: none"> ▪ No economic value attached to culture 	<ul style="list-style-type: none"> ▪ Economic value attached to the creation; emphasis on economic rights and privileges
<ul style="list-style-type: none"> ▪ Traditional in nature, rarely new 	<ul style="list-style-type: none"> ▪ Intellectual property law guarantees property rights to new creations
<ul style="list-style-type: none"> ▪ Specific laws manage and protect sacred/secret laws 	<ul style="list-style-type: none"> ▪ No special protection for sacred/secret culture
<ul style="list-style-type: none"> ▪ Gender restrictions 	<ul style="list-style-type: none"> ▪ No gender restriction

* This graphic was inspired by the one represented in the article: Terri Jenke "Indigenous Cultural and Intellectual Property: the Main Issues for the Indigenous Arts Industry in 2006".⁷⁶

Most of the indigenous communities today live in between the 'traditional' and the 'modern' world; this means living in between customary laws and modern national and international legal systems. According to the WIPO Fact-Finding Missions (1998-99),⁷⁷ most of the IP needs of the guardians of knowledge are shaped by their contact with the formal IP regime. What is too often missing is the other side of the coin. While it is, in fact, compulsory for the guardians to relate to the IP system for the protection of their knowledge, because it is the system that today rules the intellectual property world, at the same time, in democratic societies, the contrary should be applicable. In other words, the IP system should rephrase those regulations that exclude the guardians' interests, or traditional practices, and the guardianship that protects them. It should forget the time when no IP law existed, or was needed, and rephrase its own identity. In an egalitarian world, a more recent legal framework should ideally take account of the already existing practices (traditional and non), and create regulations that can effectively respond to every possible scenario. From a philosophical point of view, why should the guardians feel compelled to adhere to a Western legal framework that aims to manage their knowledge, but has no legal jargon that is inclusive of such knowledge? Why should guardianship use an IP law system that does not accommodate any of the customary regulations that the community has successfully used for centuries?

⁷⁶ Written for the Aboriginal and Torres Islander Arts Board, Australia Council electronic document <www.australiacouncil.gov.au/__data/assets/pdf_file/0003/.../ICIP.pdf> last visited on 19/08/2012.

⁷⁷ See WIPO electronic document <www.wipo.int/edocs/mdocs/mdocs/en/pcipd_1/pcipd_1_10.pdf> last visited on 12/07/2015.

One of the greatest dilemmas that scholars and indigenous representatives are today facing is whether customary laws should be codified. While they certainly could be codified, the codification would, on the other hand, freeze them in time, preventing their evolution. In addition to that, customary laws do not need to be fixed in order to be recognised by indigenous peoples. Scholars argue that the codification would help to better understand indigenous customs and integrate them into national legal systems (where required).⁷⁸ What indigenous peoples are mostly concerned about is that Western IP system has been universalized and prioritised to the exclusion of any other system of law. Which means that no matter what traditions indigenous peoples have, they can only protect them as long as they can translate their culture into Westernized language. It is irrelevant whether indigenous peoples' systems of law are effective or not. Many communities stress that they already have their own laws in place.⁷⁹ Ideally, national, international and regional *sui generis* laws, as well as laws regulating intangible property, should empower communities "to authorize legitimate uses of their knowledge and cultural expressions, and for safeguarding the traditional domain against illegitimate acts by third parties".⁸⁰ On the subject, WIPO reflects on the fact that:⁸¹

... in distilling a possible common international outcome that allows sufficient space for diversity while promoting convergence around shared norms, the provisions may need to look beyond specific legal mechanisms, such as property rights, and instead concentrate on clarifying the acts of third parties that are considered illegitimate. As has been noted in past documents, this would be consistent with the evolution of intellectual property in a range of other fields,

⁷⁸ Graham Dutfield *Protecting Traditional Knowledge: Pathways to The Future* (International Centre for Trade and Sustainable Development (ICTSD), Genève, 2006).

⁷⁹ In its report on indigenous holders of knowledge, for example, WIPO reports the interview with the Four Directions Council that comments the issue as: "Indigenous peoples possess their own locally-specified system of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its language" see WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) – Intellectual Property Needs and Expectations of Traditional Knowledge Holders (Genève, 2001) at 220.

⁸⁰ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2007) Doc WIPO/GRTKF/IC/11/9 at 20.

⁸¹ Supra at 21.

when the formulation of distinct property rights remain an option, implemented only if nations choose to take that path.

This approach would ideally leave indigenous communities to decide how to exercise their say over their culture, but mostly once the knowledge has already been exploited. In that case, the damage is done, and secret knowledge safeguarded by guardians has entered a domain in which it should have never entered. What in Western societies can, in fact, work in a defensive way, adjudicating damages in case of misappropriation, in indigenous societies it is not the economic value of the knowledge that is important, but the knowledge itself and its secrecy and traditionality. WIPO suggests to leave to domestic laws the development of *sui generis* regulations that would safeguard indigenous peoples against misappropriation.⁸² In that case, states could integrate their legislation with pre-existing fundamental rights arising within the indigenous communities, in full consideration of the development of the customary laws that regulate custodianship and the management of cultural expressions. In other words, this flexibility could include community regulations, or their scope, within a broader national legislation. However, such integration would be effective only within the border of a state. In other words, once the indigenous cultures exit the protection of state laws, no protection would be guaranteed in case of exploitation in states that do not have in place the same kind of regulations in existence in the state of origin. Good intentions aside, what today happens within the border of a state and outside its borders is not always morally praiseworthy. In most cases, even if the custodians are given the right to their say on how outsiders plan to use indigenous knowledge, when the time for a 'no' comes, the knowledge has already entered a 'forbidden domain'. That is why indigenous peoples should be given the right to preserve in their traditional ways their knowledge: including hiding it from the public domain when necessary. As it will be seen in the last chapters, this consideration excludes any resort to equity law, which sets remedies based on monetary compensation; same applies to contract and antitrust law. All these laws respond to issues that

⁸² See WIPO Customary Law and Traditional Knowledge No 7 electronic document <www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_7.pdf> last visited on 22/02/2017

have entered or are about to enter the public domain; whereas indigenous customary laws related to sacred and secret knowledge refrain the custodians of knowledge to share it with those non-entitled. According to UNESCO it is impossible to safeguard indigenous peoples' traditions without maintaining and respecting their customary practices and the traditional roles the keepers of knowledge have within the community. Article 15 of the Convention for the Safeguarding of the Intangible Cultural Heritage reconfirms that "within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management". This means that even though the guardians of knowledge and TK holders might not have property rights over the knowledge in their custody, because they "maintain and transmit such heritage", they have legal personality and can fully participate in the management of such knowledge and in the creation of ad hoc *sui generis* legislation whose scope is to safeguard and preserve indigenous heritage. The UNESCO/WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action (1985) goes through all the inadequacies of modern IP laws and suggests that it should be left to national jurisdiction, adopting *sui generis* legislation, to safeguard indigenous peoples' heritage, which, though distinctive, is nonetheless part of the heritage of a nation.⁸³ As pointed out by Daes, the reasoning behind the creation of *sui generis* legislation safeguarding indigenous peoples' culture and expressions should be regarded as a coherent completion of indigenous peoples right to self-determination⁸⁴ as stated in common Article 1 of the ICCPR and ICESCR and Art 3 of the UNDRIP. However, the limited participation of indigenous representatives at national and international

⁸³ For further information see WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitations and Other Prejudicial Actions (1985) electronic document <www.wipo.int/wipolex/en/details.jsp?id=6714> last visited on 01/12/2015.

⁸⁴ Article 2: "To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right and the duty of indigenous peoples to develop their own cultures and knowledge systems, and forms of social organization" see Erica-Irene Daes Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, elaborated in conformity with resolution 1993/44 and decision 1994/105 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Economic and Social Council, United Nations (E/CN.4/Sub.2/1995/26, GE. 95-12808 (E), 21 June 1995).

meetings, and the lack of consultation with the elders and the guardians have so far retarded any in depth understanding of indigenous cultures and the creation of effective legal mechanisms for the protection of indigenous traditions.

The next section will explain why indigenous guardians are the true stakeholders of indigenous sacred and secret knowledge and why their participation at national and international forums is so crucial for the discussion and elaboration of legislation that could effectively and successfully safeguard indigenous cultures.

4.4 - Indigenous Guardians: the 'True' Stakeholders of Indigenous Culture and Intangible Sacred Knowledge

It is true that we entered the twenty-first century and indigenous peoples (like it or not) are now part of the 'global family' inhabiting this world. In this perspective, the mixing of indigenous cultures with the world culture could be, when not forced, rightly considered the result of evolutionary patterns we are all subjected to. It is also true that the mixing of such distinctive cultures (Western and indigenous) is never easy, straightforward and painless. To give an example, by the end of the 19th century significant changes had been taking place in the lives of Australian Aborigines. When not imposed, these changes came with the death of many elders and custodians of the traditions, and the subsequent interruption of the line of transmission. Such changes were also reflective of the willingness of Aborigines to explore other traditions once theirs were lost.⁸⁵ In other more fortunate cases, change "came to traditional culture not because of the direct pressure of missionaries, but because their mere presence and example caused a shift in the community ideas".⁸⁶ This is why scholars would not need to address how far back indigenous cultural expressions go in order to safeguard their transmission. The existence of such indigenous knowledge and epistemology, being it a reflection of traditions existing prior or post colonization time, is enough to justify the existence of indigenous rights over their culture and

⁸⁵ For more information see Richard Broome *Aboriginal Australians* (3rd ed, Southwood Press, Sydney, 2001) at 77.

⁸⁶ See Broome *Aboriginal Australians* at 115.

traditions.⁸⁷ Consequently, indigenous peoples, being the holders, guardians or the totality of the community, should be considered legal personalities and granted the full accessibility to their knowledge, and the right to dispose of it as they so decide. Unfortunately, we live in a world that organises everything according to Western scientific methods and in this scientific monopoly 'indigenous issues' are not granted venues where indigenous claims are presented with indigenous epistemological instruments.⁸⁸ The Western-built legal institutions that host and analyse indigenous claims, most of the time, in fact, deconstruct and decontextualize indigenous cultures.⁸⁹ Moreover, in these forums indigenous traditional holders and custodians of knowledge are not allowed to present their own claims and fight for their own rights in their own language and using their customary laws. Indeed, the first act of violence starts when indigenous representatives are 'forced' to shift from their epistemological system of knowledge to the Western one in order to be heard; shift that often causes objective problems (linguistic, cultural, etc) in the translation of values and knowledge that are alien to the Western auditorium and, most of the time, non-translatable. In addition to that, today, international and national fora are often inappropriate venues to address indigenous issues, mostly because none of them is indigenous-oriented. At those venues, indigenous representatives can only attend as observers with no voting rights,⁹⁰ even when the decisions at stake have profound implications for indigenous lives. Overall, and on a practical level, this custom has caused much distress and many problems to indigenous

⁸⁷ "The capacity of 'tribal' peoples to live in history and to creatively interpret and expressively confront the historical circumstances in which they live-using their cultural traditions to do so-cannot be contemplated, except under marginalized categories like 'syncretism' which suggest impurity and decline" see Rosemary J Coombe *The Cultural Life of Intellectual Properties* (Duke University Press, Durham and London, 1998) at 218.

⁸⁸ "While operating at a far more subtle and sanitized manner in the late twentieth century, this epistemological tyranny still operates in the academy to undermine efforts to include other ways of knowing and knowledge production ... The power issues here are naked and visible to all who are to look: the power struggle involves who is allowed to proclaim truth and to establish the procedures by which truth is to be established ..." see Ladislaus M Semali and Joe L Kincheloe (eds) *What is Indigenous Knowledge? Voices from the Academy* (Falmer Press, New York and London, 1999) at 31.

⁸⁹ "In this Western gaze, indigenous knowledge is tacitly decontextualized, severed of the cultural connections that grant meaning to its indigenous producers, archived and classified in Western databases, and eventually used in scientific projects that may operate against the interests of indigenous peoples" see Ladislaus M Semali and Joe L Kincheloe (eds) *What is Indigenous Knowledge? Voices from the Academy* at 21.

⁹⁰ See Rule 39 – "Observers shall not have the right to vote" see WIPO General Rules of Procedure CRNR/DC/9 Rev WIPO electronic document <www.wipo.int/edocs/mdocs/diplconf/en/crn/dc/crn_dc_9.doc> last visited on 04/03/2015.

communities. How can indigenous issues be resolved if they are presented by non-indigenous representatives and any follow-on resolution is voted by non-indigenous people?⁹¹

In its article,⁹² Maina reports interviews that he conducted with the indigenous elders of Canada. The frustration indigenous peoples feel about their 'limited' presence in the international debate is often stressed in the dialogues:

People are, and rightly so, annoyed that the government is sending individuals from whatever, the Department of Foreign Affairs or Environment Canada, to go and speak on a topic that they have no knowledge of. Along the lines of representation issues, of all the people that I know that have participated in this process, very few, even the Indigenous People[s], would be what you would consider traditional knowledge holders. I have never seen somebody from Canada, like a healer or an elder at these meetings. People who go, and again it is representation based on expertise, tend to be those with expertise on intellectual property rights or biodiversity and it is not to denigrate the individuals that are attending but it is that, in the majority of the cases, nobody formally sent them.⁹³

Indigenous peoples are the stakeholders of their knowledge, and as such they should be entitled to more decision-making rights over issues that concern the livelihood of their communities or have profound implications for their future. Normally, in the international fora, attending indigenous stakeholders include specific indigenous communities, local, national and international organizations and NGOs that play a representative role of indigenous peoples' interests; while member states stakeholders include countries that are either members of organizations (eg WTO, UN) or signatories of international instruments that deal with indigenous peoples issues (DRIP, CBD, ILO 69).⁹⁴ The latter are generally

⁹¹ "Insufficient and inauthentic indigenous representation in the international forums means that their voices are not gaining any traction in these forums" see Charles Kamau Maina "Power Relations in the Traditional Knowledge Debate: A Critical Analysis of Forums" (2011) 18 *International Journal of Cultural Property* 145-178 at 158.

⁹² Charles Kamau Maina "Power Relations in the Traditional Knowledge Debate: A Critical Analysis of Forums" at 158.

⁹³ See Maina *supra* at 159.

⁹⁴ "Member states stakeholders are either individual states or regional blocks such as the African Union or the European Community (EC)" see Maina at 154.

considered as regional blocks which have the power to “exercise their right to vote with a number of votes equal to the number of their member States which are Parties. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa”.⁹⁵ In the case of industrial stakeholders, these organizations must have “direct or indirect commercial interests in traditional knowledge and are involved in the debate at the international level”.⁹⁶

The recent growing concern over indigenous peoples’ cultural survival has resulted in the growth of indigenous representatives-stakeholders who are convinced that today no existing forum is actually appropriate to host and address indigenous peoples’ issues, and are struggling to make their voices heard. In many cases, the stakeholders representing indigenous peoples’ interests are profoundly bureaucratized entities with well-defined political and social agendas that often operate at a considerable geographic, cultural and linguistic distance from the communities they pretend to represent. This distance can result in a tendency to oversimplify and romanticize the indigenous issues at stake. In his study on the indigenous of Amazonia, for example, Greene⁹⁷ suggests that the popular image we have of Amazonian Indians as guardians of the tropical forest is “in the significant part due to the alliance created between environmental NGO and indigenous peoples in the past two decades”.⁹⁸ At the same time, while it is true that the organizations sometimes provide the economic and legal resources to support indigenous issues, they often build around indigenous claims unrealistic and exaggerated expectations about the economic potential of indigenous peoples intellectual property claims.⁹⁹ In other cases, NGOs stakeholders tend to legitimize those indigenous

⁹⁵ Principle 39.2 - Rules of Procedure for Meetings of the Conference of the Parties to the Convention on Biological Diversity (CBD) electronic document <www.cbd.int/convention/rules.shtml> last visited on 03/03/2015.

⁹⁶ Supra.

⁹⁷ Shane Greene “Indigenous Peoples Incorporated?” (April 2004) 45 2 *Current Anthropology*.

⁹⁸ See Greene supra.

⁹⁹ “Researchers of all sorts, religious organizations, international funding agencies, corporations, and state bureaucracies all influence and complicate the politics of indigenous representation in accordance with their own agendas. ... dissent and internal discussion within indigenous groups over the issue of representation often gives potential credence to both sides of the argument, just as it reveals the problems inherent in negotiating collectively owned cultures with only a selection of indigenous brokers. Because of the collective nature of claims to culture as property, there is a common assumption on all sides of the debate that indigenous collectives must possess a centralized structure of representative authority

groups which conform to the political, institutional and social objectives of the organization, without confronting the complex realities of indigenous lives and customs in their environment. The situation has become so intolerable for indigenous peoples that, in 2012, indigenous representatives have ‘unanimously’ walked out of the UN World Intellectual Property Organization’s Intergovernmental Committee (IGC) in Genève.¹⁰⁰ They justified the act by stating:¹⁰¹

We, the Indigenous Peoples and Nations present at the International Indigenous Forum during WIPO IGC 20, have evaluated our participation in all of the proceedings of this Committee, and we note with concern the continued reduction of the amount and level of our participation in this process. We Indigenous Peoples have participated as experts in the IGC sessions, we have worked in good faith, and we have made efforts over the years to submit to the IGC sessions our collectively developed and sound proposals, which have been ignored or left in brackets in negotiation texts. The IGC, in its overall procedures, has systematically ignored our rights, as Indigenous Peoples and as Nations with internationally recognized collective rights, to self-determination and full and equitable participation at all levels. The draft study of the Secretariat on the participation of observers before the IGC does not contain modifications proposed by the Indigenous Peoples to WIPO’s rules of procedure. The States have obligations under their constitutions that have not been observed in the IGC, nor have they submitted proposals that could resolve the existing deficiencies in order to improve our participation. Distinguished delegates: we,

comparable to that of consolidated nation-states with which external actors can negotiate. Establishing who are the legitimate representatives of indigenous collectives is, however, often a matter of internal and external debate” see Greene *supra* footnote 94.

¹⁰⁰ “The International Indigenous Forum has presented two statements at the UN World Intellectual Property Organization’s Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore which met 14-22 February, 2012 in Geneva. The statement made on February 21, 2012, announces the withdrawal of indigenous delegations from the work of the Committee. Decided unanimously, this withdrawal is motivated by the lack of consideration for their positions and a procedure which does not allow their full and equitable participation, as recognised by the international standards. The statement made on February 22, 2012, follows the dialogue with the Chair and the Secretariat of the Committee. It announces the reinstatement of indigenous delegations to the process based on the proposals contained in this declaration, which aim at changing the mode of participation of indigenous peoples” see WIPO IGC 20 Indigenous Peoples’ Statements electronic document <www.docip.org/WIPO-IGC-20-Indigenous-People.78+M592d3115ae2.0.html> last visited on 03/03/2015.

¹⁰¹ See WIPO International: Final Statement Of The International Indigenous Forum at WIPO – IGC 20 – Indigenous Peoples Issues and Resources electronic document <www.materialworldblog.com/2012/02/statement-from-the-indigenous-forum-at-wipo/> last visited on 08/02/2015.

the Indigenous Peoples, are the titleholders, proprietors and ancestral owners of traditional knowledge that is inalienable, nonforfeitable and inherent to the genetic resources that we have conserved and utilized in a sustainable manner within our territories. For this reason, we appeal to the States to acknowledge that the discussion on intellectual property rights and genetic resources should include Indigenous Peoples on equal terms with the States since the work will directly impact our lives, our lands, our territories and resources, and will reach to the very heart of our cultures, which are the inheritance of future generations. Therefore, the Indigenous Peoples present at IGC 20 have reflected seriously on our role in this process and have decided, unanimously, to withdraw our active participation in the work developed by this Committee until the States change the rules of procedure to permit our full and equitable participation at all levels of the IGC and until the instruments recognize and are consistent with the existing international frameworks for the rights and interests of Indigenous Peoples within the scope of the IGC. Thank you, Mr. Chairman. February 21, 2012.

In their statements, indigenous representatives explained that their act was dictated by the unjustifiable lack of equal participation of the attending members.¹⁰² For indigenous representatives, the fact that they are not given effective decision-making power has profound repercussions. First of all, they are not recognised as having any authority to influence the decisions of international and national organizations or intervene in the standards of their agendas. Second, the lack of indigenous decision-making, allows powerful stakeholders to dictate and direct the agendas limiting the participation of indigenous peoples, and minimizing the importance of their claims. In WIPO's General Rules of Procedure, for example, the Observers "may take part in debates at the invitation of the Chairman, but they may not submit proposals, amendments or motions".¹⁰³ The same happens within the Working Group on Article 8 (j)¹⁰⁴ of

¹⁰² Supra.

¹⁰³ Rule 24, WIPO's General Rules of Procedure.

¹⁰⁴ Article 8 (j) states that: "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

the Convention on Biologic Diversity (CBD),¹⁰⁵ where indigenous peoples can participate only as observers. Similarly, in the CBD's Rules of Procedure it is stated again that "observers may, upon invitation of the President, participate without the right to vote in the proceedings of any meeting unless at least one third of the Parties present at the meeting object" and "may, upon invitation of the President, participate without the right to vote in the proceedings of any meeting in matters of direct concern to the body or agency they represent unless at least one third of the Parties present at the meeting object".¹⁰⁶ In the case of WTO's meetings, indigenous peoples cannot participate at all.

For the last twenty years, indigenous peoples have tried to convince the international fora that, as holders of indigenous knowledge, they are the only ones who know what traditional knowledge is and, as custodians, they should be legally entitled to suggest and work on solutions that involve the management of their own culture. In the Kimberley Declaration,¹⁰⁷ indigenous peoples expressed their position on the intrinsic idiosyncratic value of their TK for the livelihood of their communities and the preservation of indigenous identities for future generations. The Declaration reads:

Our traditional knowledge systems must be respected, promoted and protected; our collective intellectual property rights must be guaranteed and ensured. Our traditional knowledge is not in the public domain; it is collective, cultural and intellectual property protected under our customary law. Unauthorized use and misappropriation of traditional knowledge is theft.

The usage of strong words, such as 'theft', proves that indigenous peoples are fully aware of the manipulative neo-colonialist forces that today dictate national and international economic agendas. Such feelings are clearly stated a few lines later:

¹⁰⁵ The Convention on Biological Diversity (CBD) entered into force on 29 December 1993. It has 3 main objectives: The conservation of biological diversity; the sustainable use of the components of biological diversity; the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. See the text of the Convention at <www.cbd.int/convention/text/> last visited on 15/07/2015.

¹⁰⁶ See CBD Rules of Procedure, Rule 6.2 and 7.2.

¹⁰⁷ International Indigenous Peoples Summit on Sustainable Development, Khoi-San Territory, Kimberley, South Africa, 20-23 August 2002 <www.ipcb.org/resolutions/htmls/kim_dec.html> last visited on 24/06/2012.

Economic globalization constitutes one of the main obstacles for the recognition of the rights of Indigenous Peoples. Transnational corporations and industrialized countries impose their global agenda on the negotiations and agreements of the United Nations system, the World Bank, the International Monetary Fund, the World Trade Organization and other bodies which reduce the rights enshrined in national constitutions and in international conventions and agreements.¹⁰⁸

Consequently, the representatives gathered at Kimberley, urged the United Nations:¹⁰⁹

... to promote respect for the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded between Indigenous Peoples and States, or their successors, according to their original spirit and intent, and to have States honor and respect such treaties, agreements and other constructive arrangements.

The general sentiment of indigenous elders, guardians and representatives at international summits is unequivocal and yet where does the resistance lie to enforce mechanisms guaranteeing the participation, the right of self-determination, prior-informed consent and benefit sharing of indigenous stakeholders? At the G8 Summit held in Hokkaido-Japan, in 2008, indigenous representatives prepared a Declaration in which they expressed their profound concerns for the “continuing egregious violations of our civil, political, economic, cultural and social rights”. They also stated that “the continuing racism and discrimination against us and against our use of our own languages and practice of our cultures”, the “non-recognition of our collective identities as indigenous peoples” and the “theft of our intellectual property rights over our cultural heritage, traditional cultural expressions and traditional knowledge, including

¹⁰⁸ See electronic document <www.ipcb.org/resolutions/htmls/kim_dec.html> last visited on 24/06/2012.

¹⁰⁹ International Indigenous Peoples Summit on Sustainable Development, Khoi-San Territory, Kimberley, South Africa (20-23 August 2002) electronic document <www.ipcb.org/resolutions/htmls/kim_dec.html> last visited on 24/06/2012.

biopiracy of genetic resources and related knowledge”.¹¹⁰ At the G8 Summit (2008), among other important things, indigenous peoples requested that the international community “effectively implement the United Nations Declaration on the Rights of Indigenous Peoples and use this as the main framework to guide the development of all official development assistance (ODA), investments and policies and programmes affecting Indigenous Peoples”.¹¹¹ In the same vein indigenous representatives demanded that states “support the fundamental rights of Indigenous Peoples to practice and to enjoy their cultural history and the right to protect and to teach their cultural heritage through the establishment of Indigenous-owned and controlled cultural centres within states and local jurisdictions”.¹¹² In 2007, before the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), it was reported that “a set of initiatives to promote the participation of indigenous and local communities has culminated in the creation of an indigenous-chaired panel as opening segment of each session of the IGC, and the successful launch of a Voluntary Fund directly to support the participation of these communities”.¹¹³ Although the initiative of WIPO is admirable, it does not take into account important aspects of the issue. It is unrealistic to believe that all indigenous peoples are informed about the traditional practices (and related cultures) happening within the community, otherwise there would be no need for the role of the guardians. On the other hand, as underlined, the custodians are, most of the time, holders of sacred practices that cannot be disclosed to the general public inside and outside the community. In addition, contrary to what most books state, indigenous guardians are not the custodians of the resources (natural and non), but of the knowledge that comes with the use of the

¹¹⁰ Indigenous Peoples’ Declaration on G8 Summit (Hokkaido-Japan, 2008) electronic document <www.dominionpaper.ca/weblogs/lia_tarachansky/1925> last visited on 03/03/2015.

¹¹¹ “Ensure that we, Indigenous Peoples all over the world, take up the responsibility to implement the UN Declaration on the Rights of Indigenous Peoples, themselves, and enter into constructive dialogue with States, the UN System and the other intergovernmental bodies to discuss how they can effectively implement the Declaration at the local, national, regional and international levels. 3. Use the UN Permanent Forum on Indigenous Issues, the Expert Mechanism on Indigenous Peoples’ Rights, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, as mechanisms to monitor and ensure the implementation of the UNDRIP by the aforementioned actors” see Indigenous Peoples’ Declaration on G8 Summit electronic document <www.dominionpaper.ca/weblogs/lia_tarachansky/1925> last visited on 03/03/2015.

¹¹² Supra.

¹¹³ WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2007) Doc WIPO/GRTKF/IC/11/9 at 4.

resources. While resources can be static, the knowledge and cultural practices connected to them are dynamically evolving and consequently mostly unfixable. It is the knowledge that brings value to the resource. Without it, the resource would be valuable only in its potential unexplored intrinsic value. To add a problem to a problem, not all indigenous representatives or stakeholders might have at heart the best interests of their communities. Moved by easy profit, some indigenous representatives who grew up outside the educational values of the community might be capable of exploiting the cultural expressions of that same community. This scenario is today far from being unrealistic. In this case, the selection-process of indigenous representatives within international fora becomes of strategic importance. This raises the question whether indigenous experts are actually chosen by indigenous communities. In this regard, WIPO remains vague. It says that over the years the “WIPO Secretariat has continued its practice of consulting with interested representatives of indigenous and local communities on draft documents and other material being developed for the IGC”,¹¹⁴ but it does not explain who these representatives are, why they have been chosen and what credentials they bring to the forum. In addition, when it comes to indigenous representatives, WIPO explains that their role is limited to ‘consultation’, without any active participation in the voting system.

It is the belief of the author that such selection processes are of key importance for the correct and effective representation of indigenous communities within national and international fora. It is also firm belief that the participation in the decision process of traditional knowledge holders should be more effective and incisive.¹¹⁵

In the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993), indigenous representatives insisted that “existing protection mechanisms are insufficient for the protection of Indigenous Peoples

¹¹⁴ WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2007) Doc WIPO/GRTKF/IC/11/9 at 13.

¹¹⁵ Art 18 of the UNDRIP states that: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions”, whereas Art 19 carries on stating that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”.

Intellectual and Cultural Property Rights”.¹¹⁶ They stressed that the beneficiaries of the knowledge “(cultural and intellectual property rights) must be the direct indigenous descendants of such knowledge”.¹¹⁷ They added that they are “the guardians of their customary knowledge”¹¹⁸ and consequently have the right “to protect and control” its dissemination¹¹⁹ and to be “the first beneficiaries of indigenous knowledge”.¹²⁰

Over time, indigenous statements and declarations have repeated the same view that “... Indigenous Peoples and Nations ... are capable of managing our intellectual property ourselves, but are willing to share it with all humanity provided that our fundamental rights to define and control this property are recognised by the international community”.¹²¹ But who should be called to represent indigenous peoples’ interests? In the management of intellectual property, indigenous peoples often refer to the role of the guardians as keepers of the knowledge who are the only ones entitled by customary laws to manage the diffusion and transmission of the knowledge.¹²² They are the representatives that should be informed of the decisions taken in the national and international fora, and should be the representatives that attend such meetings. How could it be otherwise? How can representatives who know nothing of the sacred knowledge fight for its protection? True one can discuss the manifestation of such knowledge that has already entered the public domain through art, medical remedies, songs etc. And yet, there is a difference between the intrinsic spiritual values of the cultural expression that is embodied in the expression, and the abstract knowledge (sacred or not) that was channelled in that specific form.

¹¹⁶ Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples Commission on Human Rights Sub-Commission of Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations (Whakatane, 12-18 June 1993 Aotearoa, New Zealand, July 1993) Article 2 <www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/mataatua.pdf> last visited on 15/07/2015.

¹¹⁷ Art 2.5.

¹¹⁸ Art 2.1.

¹¹⁹ Art 2.1.

¹²⁰ Art 1.3.

¹²¹ The Julayinbul Statement on Indigenous Intellectual Property Rights (1993).

¹²² “As Indigenous women, we have a fundamental role in environmental conservation and preservation throughout the history of our Peoples. We are the guardians of Indigenous knowledge and it is our main responsibility to protect and perpetuate this knowledge. Our weavings, music, songs, costumes, and our knowledge of agriculture, hunting or fishing are all examples of some of our contributions to the world. We are daughters of Mother Earth and to her we are obliged. Our ceremonies recognize her and we return to her the placentas of our children. She also safeguards the remains of our ancestors” see The Manukan Declaration of the Indigenous Women’s Biodiversity Network (IWBN) Maunkan, Conference of the Parties to the Convention on Biological Diversity (COP 7) (Sabah, Malaysia, 4-5 February, 2004).

By saving the expression of the knowledge, do we save the knowledge? Or is the possibility of a representation of the knowledge in any forms considered necessary for the life of the community that should be safeguarded? In that case, it is the role of the guardian that becomes essential, as well as the customary laws that control it. This means that the values of the guardianship associated with the custody of the knowledge are the ones that need to be defined and protected, as living manifestations of the sacred knowledge itself. On the same token, do we need to address the existence of a knowledge and a cultural expression of that knowledge to believe it exists, or is it enough to know that it exists because it is so said, to guarantee its perpetual existence and manifestation? This is what indigenous guardians have always said. Knowledge has always existed. The guardians have been selected and granted the access and the task to ensure protection of that knowledge because they were judged suitable to guarantee the perpetual protection of the knowledge. All the rights over the knowledge reside in the customary laws. Knowledge creates the laws and the laws guarantee the continuation of the knowledge. To intervene in this circular mechanism means to interrupt or distort (alter) the flow of the knowledge itself. In this light, is it correct to use the Western legal framework as the referential point from where all laws depart if those laws were not de facto comprehensive of indigenous knowledge?

At present WIPO seems divided between the interests of TK holders and the political pressure of industrial and states stakeholders: the first stressing the holistic nature of TK and TCE which cannot become subject of “private IPRs in the hands of outside parties”;¹²³ the second insisting on the importance to work with a broader notion of protection in which indigenous custodians, as a minority in the great scheme of things, must try to accommodate their claims in order to be heard. After years of debates, it seems, however, that both requests cannot be accommodated at the same time. While a one-size-fits-all approach will not be workable for indigenous peoples, dividing IPRs into indigenous peoples and the rest of the world seems, politically and economically, not only unpractical but unrealistic. How can the world safeguard indigenous knowledge from

¹²³ Supra at 20, para 24.

commercialization while commercializing it?

In Western societies, human knowledge and the reproduction of that knowledge entails an idea of reward, personal control, dissemination and commercial agreement between the right-holder and the society that is manifested in the commercialization of the property and its protection from the commercialization's mechanisms. Intellectual property rights regulate the protection of the knowledge and its representations.¹²⁴ On the other hand, the safeguarding of indigenous knowledge can be guaranteed not in the control of the dissemination, but in the restriction of the access. In this case, indigenous peoples already possess a code of laws which guarantee the restriction of the access to the knowledge through "locally-specific system of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its language"¹²⁵ that are not recognised by national and international laws, and yet remain the best system of regulations that indigenous peoples have.

While this chapter has defined who indigenous guardians are and what their role entails within indigenous communities, the next chapters will explain that indigenous cultures, and culture in general, over the years, have acquired more importance at national and international level, and human rights and intellectual property laws have come closer in discussing the issues concerning indigenous peoples heritage and traditions, while trying to find workable solutions for the safeguard of indigenous cultures. As it will be seen next, culture itself has a broad, complex meaning that cannot be limited to a clear-cut definition and protected by a single law. The next chapter will discuss indigenous cultures and international law. The chapter is important in order to discuss and collocate indigenous peoples as legal entities within the broader context of international law. To that end, the chapter discusses how international law has, so far,

¹²⁴ See Johanna Gibson *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Ashgate Publishing, Aldershot, 2005) at Introduction.

¹²⁵ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2007) Doc WIPO/GRTKF/IC/11/9 at 20, para 25.

understood and safeguarded indigenous cultures. The chapter will also show that international law is slowly taking into consideration indigenous 'sacred' and 'secret' practices as fundamental aspects of indigenous lives and traditions that need to be respected and safeguarded

Chapter 5

Indigenous Culture and International Law

This chapter is an overview of indigenous peoples within the international legal system. It is important, in fact, to describe indigenous peoples' rights and expectations and to explain what the international legal system has done so far to safeguard their cultures and traditions.

International law is a "body of transnational rules and procedures and links to international institutions, in which the state is the primary or dominant actor".¹ According to the United Nations, "international law defines the legal responsibilities of States in their conduct with each other, and their treatment of individuals within State boundaries".² According to Anaya, while the international law of the colonial era upheld the suppression of indigenous peoples and their cultures, it continues to "be applied and regarded as affirming the sovereignty of states over indigenous peoples".³ However, things are slowly changing, and indigenous voices are today stronger than ever. The chapter will collocate indigenous peoples within the broad scenario of international affairs to delineate what has been done so far to safeguard their cultures, and what still needs to be done. Any discourse on International Intellectual Property laws applying to indigenous TK and TCE will be examined in detail in chapter 8 and 9.

¹ James Anaya "Indigenous Law and Its Contribution to Global Pluralism" (2007) 3 *Indigenous Law Journal* 3 at 4.

² "Its domain encompasses a wide range of issues of international concern such as human rights, disarmament, international crime, refugees, migration, problems of nationality, the treatment of prisoners, the use of force, and the conduct of war, among others. It also regulates the global commons, such as the environment, sustainable development, international waters, outer space, global communications and world trade" see UN electronic document <www.un.org/en/globalissues/internationallaw/>.

³ James Anaya "Indigenous Law and Its Contribution to Global Pluralism" at 5.

5.1 - International Law's Attempts to Understand and Safeguard Indigenous Peoples' Cultures and Traditions

Today, indigenous peoples' organizations, NGOs, and stakeholders are actively trying to safeguard what is left of indigenous cultures, through restitution, reparation and pressure for the adoption of *sui generis* legislation. On one side, it is clear that international and local indigenous organizations are using the existing legal measures in a defensive way to redress wrongs done in the past. On the other hand, it is also true that history cannot be changed or cancelled and the changes every society have gone through during its history is undeniable, regardless of the just or unjust reasons that determined the change. What is important today is to comprehend how fundamental it is to understand indigenous peoples' traditions and the essential role they play within indigenous societies and – where necessary – to consult with indigenous representatives and create ad hoc, *sui generis* legislation to address indigenous claims and safeguard traditional knowledge. This is because indigenous peoples have the right to self-determine their own destinies and to decide how to safeguard their traditions and preserve their integrity as they have traditionally done prior colonization.

Today indigenous peoples, TK holders and guardians are struggling to preserve what is left of their traditions. The struggle they are facing is legal and political, as well as moral and psychological. It is internal within the community, as much as external in the world at large. Much of the idea indigenous peoples have of themselves is, in fact, still influenced by an ongoing 'colonization of the mind' which has been instilled during centuries of colonization and forced assimilation. In her article Njoki Nathami Wane explains that the worse typology of colonization ever exported is the one of the mind.⁴ The colonization of the mind erodes cultures, ideas and identities, and unnaturally substitutes them with imposed prefabricated ideas that have no roots in the traditional domain of the colonized. The result is isolation, alienation, low self-esteem and a total lack of faith in the future. When international law refers to the right of self-

⁴ Njoki Nathami Wane "Mapping the Field of Indigenous Knowledge in Anti-Colonial Discourse: a Transformative Journey in Education" (2008) 11 2 *Race, Ethnicity and Education* at 183-197.

determination, it should assume that, in order for such a right to be implemented correctly, indigenous peoples should first of all regain the identity lost with the colonization process and the colonization of the mind that comes with it, and only then assess the type of future they picture for themselves and their children. In this scenario, states should encourage and facilitate such healing process.⁵ As such, indigenous peoples' culture and its dispossession remain central in any discourse on indigenous rights.

If the matter were not so important, the Preamble of the United Nations Declaration on the Rights of Indigenous Peoples⁶ would not state that:

... all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust [as well as] that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

In international law, the fundamental importance of the cultural life of any given community was firstly recognized by Article 27 of the Universal Declaration on Human Rights⁷ which states that:

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
Everyone has the right to the protection of the moral and material interests

⁵ Njoki Nathami Wane "Mapping the Field of Indigenous Knowledge in Anti-Colonial Discourse: a Transformative Journey in Education" at 183-197.

⁶ The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on Thursday, 13 September 2007 see full text at <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> last visited on 14/07/2015.

⁷ The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A (III) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected. See full text at <www.un.org/en/documents/udhr/>.

resulting from any scientific, literary or artistic production of which he is the author.

The Universal Declaration remains the primary source of global human rights standards. Every international instrument that advocates human rights refers to the UDHR. It essentially recognises the fundamental connection between culture and the survival of any community of this world. In simple terms, it advocates the importance of respecting cultures and cultural manifestations as part of people's lives. While declarations have recommendatory purposes and are not legally binding on states, today most of the Universal Declaration is however believed to have attained a customary international law status (*ius gentium*).⁸ In other words, its articles have gained mandatory legal force.⁹ Some of its provisions have even reached the character of *ius cogens*, being therefore inderogable.¹⁰ They are inherent because they are intrinsic in the characteristic of being human.¹¹ Together with the International Covenant on Civil and Political Rights (ICCPR)¹² and the International Covenant on Economic, Social and Cultural

⁸ "In Roman law, the term for the body of customary norms is *ius gentium*. Two requirements determine whether a particular norm expresses 'international custom, as evidence of a general practice accepted as law'. There is, first, an objective factor: sufficiently widespread and repeated practice by states and other international legal actors. Second, there is a subjective factor, known as *opinio juris sive necessitatis*, by which the established practice must be followed out of a sense of legal obligation. The second element is necessary because states and other international legal actors might behave in a particular way out of habit or as a matter of convenience but not feel compelled by any sense of a legal obligation to act in that manner" see James AR Nafziger, Robert K Paterson and others *Cultural Law* (Cambridge University Press, New York, 2010) at 149.

⁹ Hurst Hannum "The status of the Universal Declaration of Human Rights in National and International Law" (1995-1996) *J Int'l and Comp L* 287 at 289-290.

¹⁰ "*Jus cogens* (from Latin: compelling law; English: peremptory norm) refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted. See Ian Brownlie, *Principles of Public International Law* (5th ed, Oxford, 1998). In practice, jurists' attempt to classify certain rules, rights and duties as *jus cogens* or peremptory norms have not met with success: while there is near-universal agreement for the existence of the category of *jus cogens* norms, there is far less agreement regarding the actual *content* of this category. Id. at 517. Examples of *jus cogens* norms include: prohibition on the use of force; the law of genocide; principle of racial non-discrimination; crimes against humanity; and the rules prohibiting trade in slaves or human trafficking" electronic document <www.law.cornell.edu/wex/jus_cogens> last visited on 06/03/2015.

¹¹ See Anthea Roberts "Traditional And Modern Approaches to Customary International Law: A Reconciliation" and Dinah Shelton "Introduction: Law, Non-Law and the Problem of 'Soft Law'" in Henry J Steiner, Philip Alston and others *International Human Rights in Context*, (3rd ed, Oxford University Press, New York and Oxford, 2007) at 162 and 165; see also Hurst Hannum "The Status of the Universal Declaration of Human Rights in National and International Law" (1995) 25 *Georgia Journal of International and Comparative Law* at 295.

¹² International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

Rights (ICESCR)¹³ and their respective Optional Protocols, the UDHR form the International Bill of Human Rights. Over the years, the human rights system has been augmented by three regional Human Rights systems, established by three main conventions: the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1978), and the African Charter on Human and Peoples' Rights (1987). While the Charter of the United Nations only requires that states would "pledge themselves" to action "for the achievement" of purposes including the promotion of human rights (Art 1.2, 1.3 and Art 55), the above instruments compensate for the lack of specificity of the UN former multilateral treaty, by covering in detail the basic categories of rights that figure in the UDHR and, at the same time, include additional specific rights.

In 1966 the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹⁴ was adopted to fight racism. Although all these Conventions do not specifically refer to indigenous peoples as such, they include indigenous peoples and minorities by reaffirming the importance to eliminate every form of racial discrimination through the world as previously asserted in the UDHR (Art. 2). In doing so, they indirectly call upon states to grant protection to indigenous cultural diversity as well. Indigenous cultural rights are also guaranteed by common Article 1 of the ICCPR and ICESCR, which states that: "... all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".¹⁵ The general provision of the article has been amended

¹³ International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

¹⁴ Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.

¹⁵ Article 1 of the International Covenant on Civil and Political Rights (ICCPR) reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". This exact language is also found in article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The two abovementioned UN human rights Covenants were intended to serve as a 'more elaborate formulation of human rights standards' than the 'preliminary step' of the Universal Declaration of Human Rights that was adopted by the UN General Assembly on December 10, 1948. In other words, the above language regarding all peoples having the right of self-determination found in the Covenants of December 16, 1966, was part of the General Assembly's effort to clarify the overall framework of human rights that it began to express in the Universal Declaration of Human Rights. (See Ian Brownlie, *Basic Documents in International Law* (1983) p. 257) In the preamble of the Universal Declaration of Human Rights, we find that the General Assembly declared the human rights enumerated in that document to be 'a common standard of achievement for all

later on with Article 3 of the UN Declaration on the Rights of Indigenous Peoples (2007).¹⁶ Although since 2007 the right to self-determination is specifically referred to indigenous peoples as beneficiaries of the right, states participating in the drafting of the Declaration made sure that Article 3 would refer to the right to self-determination in its weakest form. The possible effects of such an article on the integrity of national States, in fact, deeply concerned the states participating at the drafting process. While Canada, United States, New Zealand and Australia had originally been the greatest opponents to the Declaration, it was the African Union that, quite unexpectedly, in 2006 and 2007 led a campaign to limit, in plain terms, the scope of Article 3.¹⁷ Article 46.1 was introduced to formalize such limit.¹⁸ In any event, indigenous peoples do not seek secession; they only want to benefit from the right to self-determination to build a cultural autonomy that will allow them to preserve their endangered cultures, their lands and their languages.¹⁹ Regardless of the consistent resistance of states to recognise indigenous peoples' right to self-determination for fear of secessionist claims,²⁰ indigenous peoples' demand to self-determine their own livelihood and

peoples and all nations'. The General Assembly further declared the need for the 'universal and effective recognition', of the rights enumerated therein, 'both among the peoples of the Member States themselves and among the peoples of the territories under their jurisdiction'. In short, the ICCPR and ICESCR clarify that self-determination is an essential part of what the UN General Assembly has declared to be 'a common standard of achievement for all peoples and all nations', including the peoples considered to be 'under the jurisdiction of' Member States" see Steve Newcomb (Shawnee/Lenape) "Toward the Global Liberation of All Nations and Peoples" Indigenous Law Institute electronic document <http://ili.nativeweb.org/global_liberation.html> last visited on 04/03/2015.

¹⁶ For further readings on the scope of self-determination see James Anaya *Indigenous Peoples in International Law* (Oxford University Press, New York, 2004) at 98; see also James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers Inc., 2009); Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2010); Alexandra Xanthaki *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2011); Marc Weller and Jessie Hohmann *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, Oxford and New York, 2017); Elvira Pulitano *Indigenous Rights in the Age of the Un Declaration* (Cambridge University Press, Cambridge, 2014).

¹⁷ See Assembly/AU/ Dec 141 (VIII) <www.ohchr.org/en/Issues/IPeoples/Pages/Declaration.aspx> last visited on 04/08/2014.

¹⁸ "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States".

¹⁹ See Lorie M Graham and Siegfried Wiessner "Indigenous Sovereignty, Culture, and International Human Rights Law" (2011) *The South Atlantic Quarterly* 403 at 409-413.

²⁰ "One of the issues in contention remains the definition and extent of the right to self-determination. Due to the insistence of the African governments, this right was expressly conditioned by the principles favouring the territorial integrity and political unity of states, principles that are not absolute and that already conditioned the right of self-determination under international law. Now, very few, if any, indigenous peoples actually had asked for anything approaching a threat to the territorial integrity or political unity of existing states. The goal of 'indigenous sovereignty', in particular, was mostly defined in the

wellbeing has nothing to do with any call for political independence, but it is rather linked to their right to “freely determine their political status and freely pursue their economic, social and cultural development”, as specified by Article 3 of the UNDRIP. Article 4 of the Declaration, consistently guarantees indigenous peoples’ “right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”. Indigenous claims to self-determination and autonomy are fundamentally related to indigenous peoples’ struggle for cultural integrity, based on the need to ensure continuity with their traditions and customs. On considering autonomy, cultural autonomy is today more readily recognised than other aspects of self-determination.²¹ As shown in the previous chapters, when speaking of indigenous cultures we try to enter into a realm that is not easily accessible. It is the realm of the sacred, the secret and holistic beliefs and practices. In his article on indigenous cultural rights, Wiessner quotes Professor Reisman in explaining that, while political and economic rights are important:²²

... it is the integrity of the inner worlds of peoples – their rectitude systems or their sense of spirituality – that is their distinctive humanity. Without an opportunity to determine, sustain, and develop that integrity, their humanity – and ours – is denied.

Indigenous peoples’ sovereignty cannot be separated from their cultures, practices and their sacred lands. Given the complex interconnectedness of the

sense of cultural and spiritual reaffirmation much more than in the Western sense of independent political power. Looking at state practice, very widespread agreement persists, as stated in 1999, that indigenous peoples ‘hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice’” see James Anaya and Siegfried Wiessner “The UN Declaration on the Rights of Indigenous Peoples: Towards re-empowerment” electronic document <<http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>> last visited on 27/06/2012.

²¹ According to Smith “... cultural autonomy would enable indigenous peoples ... to live in accordance with their traditional practices, customs and laws ... and to ... develop those practices in response to the evolving society in which they find themselves” see Rhona KM Smith *Text and Materials on International Human Rights* (Routledge, New York, 2007) at 444.

²² See Geoffrey Reisman “International Law and the Inner Worlds of Others” (1996) 9 *St Thomas J Rev* 25 in Siegfried Wiessner “The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges” (2011) 22 *1 EJIL* 121 at 128.

experiences of life of indigenous peoples, their claims are fundamentally cultural.²³

5.2 - Indigenous Right to Self-determination

The right of self-determination is today considered one of the major developments of international law during the second half of the twentieth century.²⁴ Davis considers it both a principle of international law and a bedrock human right which is today at the core of democratic entitlement.²⁵ Although discussed during the negotiations of the UNDRIP, indigenous peoples do not qualify for the secessionist aspect included in the right to self-determination (often referred as the external dimension of the right), because they have been unequivocally excluded from the category of colonized people.²⁶ However, they still benefit from the 'internal' right to self-determination, which entails the right to preserve and manage their own culture and traditions in accordance with their values.²⁷ This is why the UN Declaration on the Rights of Indigenous Peoples, while restricting the right to self-determination to its internal character (by adding article 46), nonetheless recognises the respect for indigenous knowledge, cultures, traditional practices and traditional lands.

²³ Siegfried Wiessner "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges" (2011) 22 1 *EJIL* 121 at 129.

²⁴ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (2010) International Court of Justice at 141 electronic document <www.icj-cij.org/docket/index.php?p1=3&p2=4&case=141&p3=4> last visited on 05/01/2015.

²⁵ Megan Davis "Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Right of Indigenous Peoples" (2008) 9 *Melbourne Journal of International Law* 439 at 459.

²⁶ "The problem with the UN's decolonization process was this: the choice as to the political future of colonized peoples was not given to the individual peoples conquered, but to the inhabitants of territories colonized by European conquerors, within the boundaries of the lines of demarcation drawn by the colonizers. Thus the colonizers, via their constituting the new country's 'people' under the new sovereign's control, continued to rule the colonized from their grave. The name of the game in *uti possidetis*, a Roman legal term that essentially means one should leave the place as one received it" see Siegfried Wiessner "Indigenous Self-determination, Culture, and land: a Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples" in Elvira Pulitano *Indigenous rights in the Age of the UN Declaration* (Cambridge University Press, Cambridge, 2012); see also GA Res 1514, UN GAOR, 15th Sess, Supp No 16, UN Doc A/4684 (December 14, 1960); GA Res 1514, UN GAOR, 15th Sess, Annex, UN Doc A/4651 (December 15, 1960); see Malcolm N Shaw "The Heritage of States: The Principles of *Uti Possidetis Juris* Today" (1997) 67 *British Year Book of International Law* 75; see Helen Ghebreyebet *Identifying Units of Statehood and Determining international Boundaries: A Revised Look at the Doctrine of Uti Possidetis and the Principle of Self-determination* (Peter Lang, Frankfurt am Main and New York, 2006).

²⁷ See Dianne Otto "A Question of Law or Politics? Indigenous Claims to Sovereignty" (1995) 21 *Syracuse Journal of International Law and Commerce* 65.

Sitting on the bedrock of all the human rights instruments, the Declaration reconfirms that indigenous peoples are entitled “to all human rights recognized in international law”, as well as that they “possess collective rights which are indispensable for their existence” (Preamble).²⁸ As beneficiaries of fundamental rights, indigenous peoples have the right to not be subjected to the destruction of their cultures and any ethnocidal practice (Art 8) and to revitalise their cultural traditions and customs (Art 11.1). The UNDRIP attributes importance to the spiritual aspect of indigenous cultures by stressing in Art 11.2 that states should redress and respect the cultural, intellectual, religious and spiritual property of indigenous peoples. As such, they have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies along with maintaining their religious and cultural sites and the usage of their ceremonial objects (Art 12.1). Part of the survival of indigenous identities rests in their right to revitalize, use, develop and transmit histories, languages and oral traditions to future generation (Art 13.1). Indigenous peoples have the right to the dignity and the diversity of their traditions, which are different from the ones of the Western world (Art 15). As such, they can create the media coverage that better responds to their needs (Art 16.1). In addition to that, they have the right to use and preserve their traditional medical practices and the plants, animals and minerals that they need for healing (Art 23.1). Concerning traditional lands and territories, which are fundamental for their well-being (art 25), indigenous peoples have the right to maintain and strengthen the distinctive spiritual relationship with their land (owned or occupied). They must also be guaranteed the respect, return and access to the lands that are spiritually and traditionally essential for indigenous sacred/secret practices (Art 26 and 28). Article 31 refers to the protection, control and development of indigenous heritage. Among all the articles of the Declaration, this is the one that directly refers to indigenous cultural property, as well as to intellectual property of their traditional knowledge and cultural expressions. Article 26 of UNDRIP states that “indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”. They also “have

²⁸ UN Declaration on the Rights of Indigenous Peoples (2007) electronic document <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired”; and “States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned”. The Article completes the “spiritual and cultural value” of land and territories previously introduced by Article 11.1 and 12.1.²⁹

As is well known, for its very nature, the Declaration is not in itself legally binding. States originally voting against it, such as the United States,³⁰ have rejected the possibility that UNDRIP is, or would become, customary international law, because it does not constitute evidence of customary international law. It is argued that the Declaration lacks support of state practice and cannot provide a proper basis for legal actions, complaints, or other claims in any international, domestic, or other proceedings.³¹ However, as stressed on a few occasions by Professor Anaya (Special Rapporteur on the Rights of Indigenous peoples (2008-14)), every right contained in the Declaration must be independently assessed before excluding any existence of customary international law.³² Anaya and Weissner claim that:³³

... in the case of the UN Declaration on the Rights of Indigenous Peoples, the negative vote by four governments, even though they have significant number of indigenous peoples living in their midst, does not necessarily invalidate the claims to the customary international law character of individual key parts of the instrument or of principles embedded in it. This distinct body of customary

²⁹ Art 11.1: “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature”. Art 12.1: “Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains”.

³⁰ The States against the endorsement of the Declaration were United States, New Zealand, Canada and Australia. In the following years, they all changed their vote and endorsed the Declaration.

³¹ James Anaya and Siegfried Wiessner “The UN Declaration on the Rights of Indigenous Peoples: Toward Re-empowerment” (2007) electronic document <<http://jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php>> last visited on 03/01/2015; see also Siegfried Wiessner “The Cultural Rights of Indigenous peoples: Achievement and Challenges” (2011) 22 *1 EJIL* 121 at 130-131.

³² See James Anaya *International Rights and Indigenous Peoples* (Aspen Publishers, 2009).

³³ *Supra*.

international law concerning indigenous peoples, not necessarily coextensive with the full reach of the present Declaration, had formed long before this vote occurred.

Many scholars conveniently consider UNDRIP 'just' a Declaration with no legally binding status, but this is incorrect.³⁴ It may be argued, as often happens, that when it comes to indigenous peoples, most of the regulations referring to them constitute soft law and are not binding; while some others are regional regulations with no universal applicability, and others, like ILO 169, have been ratified by only a small number of states. However, the fact that all pertinent articles restate the same concepts and principles using nearly the same language should trigger the question whether these regulations have reached the status of customary international law. Commenting on the non-binding nature of the UNDRIP and customary international law related to indigenous populations, Anaya confirmed that:³⁵

... this distinct body of customary international law concerning indigenous peoples, not necessarily co-extensive with the full reach of the present Declaration, had formed long before this vote occurred.

Although the language of the Declaration might be more exhaustive than other contemporary instruments concerning indigenous populations, however, the provisions stated in it cannot be considered new. In the same line, in his article on the UNDRIP, Wiessner³⁶ argues that though declarations and soft law in

³⁴ See International Law Association Rights of Indigenous Peoples – Final Report (Sofia Conference, 2012) electronic document <www.ila-hq.org/download.cfm/docid/227B560E-F0F5-4773-BECC974CFC6A11B8> last visited on 03/03/2015.

³⁵ "In analyzing the individual parts of the Declaration, we see that all new rules of customary international law, as found in our respective surveys of state and international practice of 1999, 2001, and 2004, still remain part of the global consensus. As stated in 1999, 'indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life'. Most of the provisions of the Declaration go to the preservation of culture, language, religion, and identity; and state practice in the states with indigenous peoples largely conforms to these legal tenets. Due to the strength of the indigenous renaissance throughout the world, the original goal of assimilation of indigenous cultures into the maelstrom of the modern world has largely been abandoned in favour of preservation and reinvigoration of indigenous cultures, languages and religions. The legal guarantees of these claims are, however, not the real bones of contention" see James Anaya and Siegfried Wiessner "The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment" electronic document <<http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>> last visited on 27/06/2012.

³⁶ Siegfried Wiessner "United Nations Declaration on the Rights of Indigenous Peoples".

general are aspirational instruments in nature, in the case of the Declaration on the Rights of Indigenous Peoples some of its provisions have reached a status of customary international law. He confirms that:³⁷

... UNDRIP is a solemn, comprehensive and authoritative response of the international community of States to the claims of indigenous peoples, with which maximum compliance is expected. Some of the rights stated therein may already form part of customary international law, others may become the *fons et origo* of later-emerging customary international law. Scholarly analyses of State practice and *opinio juris* have concluded that indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life; that they hold the right to political, economic and social self-determination, including a wide range of autonomy; and that they have a right to the lands they have traditionally owned or otherwise occupied and used.

The same conclusion has been reached in 2012 by the International Law Association, which recognized that although not all of UNDRIP reflects customary international law, “it includes several key provisions which correspond to existing State obligations under customary international law”.³⁸ Most of UNDRIP regulations were already phrased in existing instruments referring to indigenous peoples, and in most cases they reflect state practice and, therefore, can correctly be considered as customary international law. In his commentary to the Declaration, Anaya stresses that the recognition of indigenous ‘cultural’ rights is today part of a general consensus and state practice that have crystallized into customary international law. Anaya recognises that:³⁹

³⁷ Supra.

³⁸ The 2012 ILA Final Report on the Rights of Indigenous Peoples also recognises the fact that “in general terms, a progressively growing number of States is incorporating provisions concerning indigenous peoples’ land rights in their domestic legislation, including at the constitutional level” and also that “the competent international institutions incessantly continue to remind States about their obligations related to indigenous peoples land rights. This holds true, in particular, with respect to ILO supervisory bodies and to the UN Committee on the Elimination of Racial Discrimination, as well as, at the regional level, with respect to the Inter-American Commission and the IACHR” see International Law Association, RESOLUTION No 5/2012 Rights of Indigenous Peoples at 1.

³⁹ James Anaya and Siegfried Wiessner “The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment” electronic document <www.twinside.org.sg/title2/resurgence/206/cover3.doc> last visited on 25/10/2012; In addition to that, and as recently underlined by Wiessner: “The Awas Tingni decision of the Inter-American Court of Human Rights and the internationally successful campaign of the

... new rules of customary international law, as found in our respective surveys of state and international practice of 1999, 2001, and 2004, still remain part of the global consensus. ... Most of the provisions of the Declaration go to the preservation of culture, language, religion, and identity; and state practice in the states with indigenous peoples largely conforms to these legal tenets. Due to the strength of the indigenous renaissance throughout the world, the original goal of assimilation of indigenous cultures into the maelstrom of the modern world has largely been abandoned in favour of preservation and reinvigoration of indigenous cultures, languages and religions.

Concerning state practice, Chief Justice A O Conteh, of the Belize Supreme Court, for example, believes that Article 26 (UNDRIP) simply summarizes pre-existing customary international law (and state practice),⁴⁰ which is, in fact, contained in other existing international legal instruments that recognise ownerships or native title of traditional territories.⁴¹ The Supreme Court of Belize relied on the Declaration to affirm that land and resources rights of the Mayans⁴² today form part of customary international law.

In *Mabo v Queensland* (No. 2),⁴³ the Australian High Court found that:⁴⁴

Western Shoshone against the taking of their sacred lands are just two examples reaffirming the original assessment, based on recent state practice, that the lands traditionally held by indigenous peoples are theirs as a matter of right under customary international law. Honoring the land rights of indigenous peoples is the first step toward preservation of their culture” see Siegfried Wiessner “Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples” (2009) 41 *Vanderbilt Journal of Transnational Law* 1141 at 1144-1145.

⁴⁰ See *Aurelio Cal, et al v Attorney General of Belize* Supreme Court of Belize Claims No 171 and 172 of 2007) (18 Oct 2007) (Mayan land rights) electronic document <https://law2.arizona.edu/iplp/outreach/maya_belize/documents/Claim%20366%20of%202008.pdf> last visited on 04/08/2014.

⁴¹ See Siegfried Wiessner “United Nations Declaration on the Rights of Indigenous Peoples” at 6 electronic document <<http://65.60.52.92/sites/default/files/undecarationontherightsofindigenouspeoples.pdf>> last visited on 05/01/2015; see also Siegfried Wiessner and James Anaya “The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment”; see also International Law Association Rights of indigenous Peoples-Final Report (Sofia, 2012) electronic document <www.ila-hq.org/en/committees/index.cfm/cid/1024> last visited on 05/01/2015.

⁴² See electronic document <https://law2.arizona.edu/iplp/outreach/maya_belize/documents/Claim%20366%20of%202008.pdf> last visited on 03/01/2015.

⁴³ *Mabo v Queensland* Case No 2 [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).

⁴⁴ See *Mabo v Queensland* (No 2) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992) electronic document <www.austlii.edu.au/au/cases/cth/high_ct/175clr1.html> last visited on 14/12/2011.

... the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland.

Indeed, although the UNDRIP was created ad hoc to respond to indigenous peoples' issues, it does not represent the only instrument that, over the years, has taken into consideration indigenous peoples' cultures and traditions, needs and expectations.

5.3 – Indigenous Peoples and the UN Human Rights System

The idea of cultural human rights within international human rights laws is that everyone is entitled to the dignity of life while living in accordance with his/her traditions and beliefs in the territories that have special significance for them and can guarantee the continuation of their cultures and traditions. On the same line, Article 15(1)(a) of the ICESCR stresses that "States parties to the present Covenant recognize the right of everyone to take part in cultural life". Again, some believe that these formulations, which initially involved individuals, started reflecting over time the desire to protect culture through individual rights of members of a distinctive group, rather than collective rights of the group itself. However, treaty-monitoring bodies seem to have gone in the direction of a 'collectivization' of these rights. The UN Committee for Economic, Social and Cultural Rights stated that minorities and indigenous peoples must be guaranteed the freedom to practice and promote awareness of their culture, defined in both individual and collective dimensions and as reflecting "the community's way of life and thought".⁴⁵ When it comes to protecting indigenous cultural rights, Art 27 of the ICCPR has been successfully used in many cases by indigenous individuals. In this respect, indigenous peoples are considered as a

⁴⁵ General Discussion on the Right to Take Part in Cultural Life as recognized in Art 15 of the ICESCR, UN Doc E/1993/23 Ch VII at para 204, 205, 209 and 210. See Human Right Bodies electronic document <www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> last visited on 04/03/2015.

sub category of 'minorities' (though the concept of minorities is generally distinguished from the notion of indigenous peoples). While ICCPR's provisions were initially conceived for individuals, and not for groups of individuals, over time, the scope of the article has slowly extended in practice to include groups of people that are united by idiosyncratic traditions and cultures. In fact, some rights, though being on paper reserved to individuals have an inherent group character which includes group identity (such as race, ethnicity, gender, religion), or in the sense that such right is generally shared with others (as suggested by Art 27).⁴⁶ According to Anaya, over the years, indigenous peoples have bypassed the individual-state dichotomy and claimed and articulated "human rights in terms of group or collective rights".⁴⁷ In their discourses over land, culture, sacred and secret practices and rights, indigenous leaders, elders and custodians have given clear explanations and illustrations "providing convincing justifications for collective rights".⁴⁸ In its language, Art 27 of the ICCPR states that "persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". In other words, the Covenant seems to initially protect the rights of persons who belong to a 'cultural group' as opposed to rights held by the whole group. However, in its application in practice, Article 27 has acquired a collective dimension. Anaya often supports the view that culture is an "outgrowth of collectivity"; therefore, when speaking of cultural practice, one always refers to the culture of a particular cultural group.⁴⁹ In the ground-breaking *Lovelace v Canada* case⁵⁰ (1981), Ms Lovelace, a Maliseet Indian, after the marriage with a non-Indian, was no longer entitled to live on the Tobique Indian Reserve with her parents.⁵¹ She

⁴⁶ Henry J Steiner, Philip Alston and others *International Human Rights in Context* (3rd ed, Oxford University Press, New York and Oxford, 2007) at 153.

⁴⁷ James Anaya "Indigenous Law and Its Contribution to Global Pluralism" (2007) 3 *Indigenous Law Journal* 3 at 6.

⁴⁸ Anaya *supra*.

⁴⁹ "Given that culture is a product of, and is manifested through group dynamics, the enjoyment of rights connected with culture is mostly meaningful in a group context" see James Anaya "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State" (2004) 21 *Arizona Journal of International and Comparative Law* 13 at 22.

⁵⁰ *Sandra Lovelace v Canada*, Communication No R.6/24, UN Doc Supp No 40 (A/36/40) at 166 (1981).

⁵¹ "The Human rights Committee ... has to proceed from the basic fact that Sandra Lovelace married a non-Indian ... and consequently lost her status as Maliseet Indian under section 12(1)(b) of the Indian Act. This

was consequently denied the right to return to her tribe after divorcing. The Human Rights Committee, acting under Article 5(4) of the Optional Protocol, found that the denial to return to her tribe was, *inter alia*, in breach of Art 27 of the ICCPR. By being a member of the Maliseet Indians, Sandra Lovelace belonged, *de facto*, to a minority group and, as such, she was entitled to protection under Art 27.⁵² Besides, by refusing Ms Lovelace to return to her community, the Canadian Indian Act was denying her the access to her native culture and language, which was practiced nowhere else outside her communities.⁵³ This again, was regarded by the Committee as a denial of the woman's fundamental right to live in the Tobique Indian Reserve with her community, practicing her culture and traditions.⁵⁴ In the *Apriana Mahuika vs New Zealand* case⁵⁵ the claimants stated that:

... the Government's actions are threatening their [Māori] way of life and the culture of their tribes, in violation of article 27 of the Covenant. They submitted that fishing is one of the main elements of their traditional culture, that they have present-day fishing interests and the strong desire to manifest their culture through fishing to the fullest extent of their traditional territories.

At para 9.8, the Committee recognised the individual and collective importance of fishing activities for Māori people as well as its spiritual and traditional significance, and stressed that “the State party continues to be bound by article 27 which requires that the cultural and religious significance of fishing for Maori must deserve due attention in the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act”.⁵⁶

provision was – and still is – based on a distinction *de iure* on the ground of sex” see *Lovelace v Canada*, Communication No R.6/24*/ 30 July 1981 at para 10.

⁵² *Lovelace v Canada* at para 14.

⁵³ “The Indian Act was amended in 1985 to eliminate gender discrimination in determining Indian status. The amendments also restored status of aboriginal women who had lost status through the old legislation's “marrying out” provisions. As of June 1995, the amended Act allowed for the reinstatement of 95, 429 persons, more than half of whom were women (57.2%)” see *Sandra Lovelace v Canada*, Communication No 24/1977: Canada 30/07/81, UN Doc CCPR/C/13/D/24/1977 electronic document <www.escr-net.org/docs/i/1307559> last visited on 02/12/2015; in 1982 Canada also passed the Canadian Charter of Rights and Freedoms.

⁵⁴ DJ Harris *International Law, Cases and Materials* (Sweet & Maxwell, London, 2004) at 725-726.

⁵⁵ *Apriana Mahuika vs New Zealand*, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000).

⁵⁶ “With reference to its earlier case law (19), the Committee emphasises that in order to comply with article 27, measures affecting the economic activities of Maori must be carried out in a way that the authors

The *Lansman* cases⁵⁷ and the *Apriana Mahuika* case⁵⁸ reconfirmed that Art 27 includes a dimension that protects indigenous peoples' collective nature. According to Svensson:⁵⁹

... the question of cultural survival has become a growing concern for encapsulated minorities in ethnically plural situations. In the relationship between relatively powerless indigenous minorities and the nation-state, cultural survival is not only a matter of culture *per se*. It can also be regarded as a human rights issue based on political rights and land rights, the two predominant elements subsumed in what is referred to as 'Aboriginal rights'.

In his article,⁶⁰ Svensson confirms the collective nature of indigenous culture and property rights as intrinsically connected one to another.

In 1994, the UN Human Rights Committee re-considered the collective nature of indigenous cultural rights, and clarified that the persons designed to be protected (by Art 27) are those "who belong to a group and who share in common a culture, a religion and/or a language".⁶¹ Hence, although Art 27 refers to individual rights, it is intended to protect the values belonging to the community as well, which will otherwise be deprived of instruments guaranteeing its survival and its continued cultural development.⁶² The practice of other human rights monitoring bodies confirms the idea that indigenous peoples often have holistic cultural traditions which deserve respect and

continue to enjoy their culture, and profess and practice their religion in community with other members of their group. The State party is under a duty to bear this in mind in the further implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act" at para 9.9.

⁵⁷ *Ilmari Lansman v Finland* No 511/1992 UN Doc CCPR/52/D/511/1992 and *Jouni E Lansman v Finland* No 671/1995 UN Doc CCPR/C/58/D/671.1995.

⁵⁸ *Apriana Mahuika et al v New Zealand* No 547/1993 UN Doc A/56/40 (2000).

⁵⁹ Tom G Svensson "Right to Self-Determination: A Basic Human Right Concerning Cultural Survival: The Case of the Sami and the Scandinavian State" in Abdullahi Ahmed An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives Perspectives* (University of Pennsylvania Press, Philadelphia, 1992) at 363.

⁶⁰ *Supra*.

⁶¹ "Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group ... The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole" see at paras 6.2 and 9, Human Rights Committee, General Comment 23, Article 27 UN Doc CCPR/C/21/Rev.1/Add.5 (1994) electronic document <<http://www1.umn.edu/humanrts/gencomm/hrcom23.htm>> last visited on 19/09/2009.

⁶² Federico Lenzerini "The Status of Indigenous Peoples in International Law" in Federico Lenzerini (ed) *Reparations for Indigenous Peoples* (Oxford University Press, New York, 2008) at 89.

protection. However, according to Makau Mutua, Western societies still tend to resist the cultural autonomy of indigenous peoples. In his words:⁶³

... international human rights fall within the historical continuum of European colonial project in which the whites pose as the saviours of a benighted and savage non-European world Thus human rights reject the cross fertilization of cultures and instead seek the transformation of non-Western cultures by Western cultures.

It took until the establishment of the UN Working Group on Indigenous Populations (WGIP, 1982)⁶⁴ for indigenous peoples to have a political venue to which they could bring their claims and express their concerns about any on-going discrimination.⁶⁵ Over the years indigenous revival had been forcing the international community to revise the concept of property, being it tangible, intangible, intellectual, etc. It was to this end, that “the Working Group on Indigenous Populations (WGIP) of the Sub-Commission on the Promotion and Protection of Human Rights (then called Sub-Commission on Prevention of Discrimination and Protection of Minorities) was established by a decision of the United Nations Economic and Social Council”.⁶⁶ Since the 1980s, the Working Group also sponsored studies (in the form of reports, decisions, and

⁶³ Makau Mutua “The Complexity of Universalism in Human Rights” in Andras Sajo (ed) *Human Rights with Modesty* (Springer, 2004) at 51.

⁶⁴ Following a reform to the UN human Rights machinery, the Human Rights Council adopted resolution 6/16 to request the Office of the High Commissioner for Human Rights to convene an informal meeting to discuss the most appropriate mechanisms to continue the work of the working Group on Indigenous Populations. The Informal meeting took place in Geneva on 6 December and the morning of 7 December 2007. As a follow-up to the informal meeting the indigenous caucus and a number of governments continued informal negotiations to finalize a draft resolution and submitted to the resumed 6th session of the Human Rights Council. On December 14, 2007 draft resolution A/HRC/6/L.42 (HRC Resolution 6/36) establishing a new expert mechanism on the rights of indigenous peoples was adopted by consensus by the HRC electronic document <www2.ohchr.org/english/issues/indigenous/groups/groups-01.htm>.

⁶⁵ “Since the establishment of the Working Group on Indigenous Populations, indigenous peoples have emphasized in that forum the fundamental nature of their relationship to their homelands. They have done so in the context of the urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance to indigenous societies of their lands, territories and resources for their continued survival and vitality. ... It must be noted that, as indigenous peoples have explained, it is difficult to separate the concept of indigenous peoples’ relationship with their lands, territories and resources from that of their cultural differences and values. The relationship with the land and all living things is at the core of indigenous societies” see Erica-Irene Daes *Indigenous Peoples and their Relationship to Land*, Economic and Social Council, UN Doc E/CN.4/Sub.2/2001/21 at para 12-13.

⁶⁶ See electronic document <http://www.un.org/esa/socdev/unpfii/en/about_us.html> last visited on 15/12/2012.

resolutions)⁶⁷ on indigenous peoples' way of life to understand the holistic and spiritual approach to land and resources they traditionally have. Back in 1983, Special Rapporteur Jose Martinez Cobo had already produced a very detailed report (with recommendations annexed), in which the 'distinct relationship' indigenous peoples had with their land was carefully addressed. The report states that:⁶⁸

It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture. ... For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.

It was Cobo's report that led to the creation of the WGIP. Before Cobo's Report, the 1957 Indigenous and Tribal Populations Convention (ILO 107) was the first Convention dedicated to indigenous peoples which, though assimilationist in scope and paternalistic in language, encouraged states to take into account indigenous peoples' cultural and religious values (Art 4), while promoting their social, economic and cultural development (Art 2). The part on the land recognised indigenous peoples' collective ownership of the land and their right to the territories they are traditionally occupying. This, according to Anaya, "demonstrates the long-standing concern in international practice for protecting indigenous peoples' rights to their traditional lands".⁶⁹ Less assimilationist and paternalistic in language and scope, ILO 169 Convention on Indigenous and Tribal Peoples (ILO, 1989)⁷⁰ revised and broadened the scope of ILO 107 and focussed on the

⁶⁷ See Working Group on Indigenous Populations electronic document <www.ohchr.org/EN/Issues/IPeoples/Pages/WGIP.aspx> last visited on 05/01/2015.

⁶⁸ Study of the Problem of Discrimination Against Indigenous Populations "Final report submitted by the Special Rapporteur Mr. José Martínez Cobo" (1981-3) Doc E/CN.4/Sub.2/476, Doc E/CN.4/Sub.2/1982/2 and Doc E/CN.4/Sub.2/1983/21.

⁶⁹ James Anaya and Robert A Williams Jr "The protection of Indigenous Peoples' Rights over Lands and Natural resources Under the Inter-American Human Right System" (2001) 14 *Harvard Human Rights Journal* 33 at 54.

⁷⁰ Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Entry into force on 05 Sep 1991) (Gèneva, 76th ILC session, 27 Jun 1989).

intangible character of indigenous culture, by stating that “in applying the provisions of this Convention: (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; (b) the integrity of the values, practices and institutions of these peoples shall be respected” (Article 5). ILO 169 stresses that indigenous peoples “shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control” (Art 7.1). The Convention carries on contributing with a whole section on land rights upholding, *inter alia*, that indigenous peoples should be recognised “... possession of the peoples concerned over the lands which they traditionally occupy”. In addition “... measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities” (Art 14.1). Part II of the Convention is, in fact, dedicated to indigenous land rights (from Article 13 to 19), from the spiritual values and relationships indigenous peoples have with the traditional territories they occupy or use (Art 13, 14), to the use of the rights concerned to the natural resources to which they need access (Art 15). Article 13 explains the holistic and spiritual importance of indigenous traditional territories, and encourages states to approach indigenous issues taking into account this ‘special’ holistic relationship”.⁷¹ In short, the Convention reiterates that the land has an intrinsic cultural value which, over the centuries, has guaranteed indigenous peoples’ survival both physical and spiritual. Therefore, States parties have the duty to take the necessary steps to identify which lands were owned or used by indigenous peoples and try, where it is not possible to recognize ownership to, at least, guarantee access and work with indigenous representatives to find alternative locations which would be suitable for the

⁷¹ ILO Article 13.1: “In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. 2: The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”.

practice of their traditional activities. Even if the number of states ratifying the Convention is very limited, and there is persisting international resistance to specific regulations (in this case to the safeguarding of indigenous peoples' heritage and territories), the growing emergence of instruments addressing specific issues on indigenous cultures and traditions today influence state behaviour at national and international level. As will be seen in chapter on the Waitangi Tribunal case WAI 262, there is a growing undeniable interest at national level on the preservation of indigenous cultures and traditions.

5.4 – International Law and Indigenous Traditional Territories

As introduced in chapter 2, indigenous peoples have a holistic approach to land, which means that land is not regarded as a commodity, but it is instead a “living tradition over which the collectivity holds a communal responsibility and exercise custodianship”.⁷² Indigenous traditional territories are considered today part of indigenous culture and their preservation is considered of fundamental importance for the preservation of indigenous cultures. According to IUCN Guidelines for Protected Area Managers (2008),⁷³ one of the defining features that traditional/sacred natural sites have in common is that people have cared for these places for a very long time, by often keeping the location secret and therefore accessed only by a few.⁷⁴ These few are people who have acted as guardians or custodians of the spiritual, cultural and biological values of such places and are usually closely identified with these locations.⁷⁵

The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage does not speak of traditional sacred sites, but of ‘cultural spaces’ of

⁷² Michele Langfield, Willieam Logan and others *Cultural Diversity, Heritage and Human Rights* (Routledge London and New York, 2010) at 32.

⁷³ Robert Wild and Christopher McLeod (eds) *Sacred Natural Sites: Guidelines for Protected Area Managers*, International Union for Conservation and Natural Resources (Gland, Switzerland, 2008).

⁷⁴ Supra at 7.

⁷⁵ ‘Custodian’ in this regard “covers in a single word, complex and often multi-layered management, ownership and institutional situations” ... “The custodial situations of individual sacred natural sites are therefore unique and need to be approached with care. Custodians may range from an extended family, several clans, tribes or other indigenous groups, whole communities, multiple indigenous ethnic groups, churches, temples, monastic orders, groups of monastic orders, sects, and groups from multiple religions. Identifying and interacting with custodians of sacred natural sites often requires great sensitivity, respect and trust building, sometimes in historically difficult, politically charged and very tense situations. The legitimacy, and sometimes even the authenticity, of individuals or groups to be recognised as custodians cannot be assumed” at 7.

importance because people recognise them as part of their cultural heritage.⁷⁶ Therefore, land is broadly regarded as part of indigenous culture.⁷⁷ As such, since the 1970s, more attention has been devoted to the preservation and, when possible, restitution of traditional lands to indigenous peoples on the basis of the intrinsic significance these places have for their cultural survival and the transmission of their heritage to future generations. In 1978, during the World Conference to Combat Racism, the 'special relationship' indigenous peoples have with their land and the crucial importance this bond has for the continuity of indigenous lives and traditions was acknowledged.⁷⁸ A holistic approach to the issue proved to be unquestionable. During the 1978 and 1983 UN World Conferences to Combat Racism and Racial Discrimination, for the first time, CERD directed special consideration to indigenous issues.⁷⁹ In addition to that, in 1997 CERD General Recommendation No XXIII⁸⁰ addressed again indigenous' cultural issues calling upon states to recognise and respect indigenous distinct cultures.⁸¹

⁷⁶ Article 2.1: "For the purposes of this Convention, the 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity" see Convention for the Safeguarding of the Intangible Cultural Heritage, The General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) (Paris, from 29 September to 17 October 2003) at 32nd Session.

⁷⁷ The International Convention Concerning the Protection of the World Cultural and Natural Heritage, United Nations Educational, Scientific and Cultural Organization (UNESCO) Adopted by the General Conference at its seventeenth session Paris (16 November 1972) defines natural heritage sites as: "works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view" (Art 1.3).

⁷⁸ General Issue 43 states: "We also recognize the special relationship that indigenous peoples have with the land as the basis for their spiritual, physical and cultural existence and encourage States, wherever possible, to ensure that indigenous peoples are able to retain ownership of their lands and of those natural resources to which they are entitled under domestic law" electronic document <www.un.org/WCAR/aconf189_12.pdf> last visited on 10/09/2011.

⁷⁹ In its Programme of Action, the 1978 UN Conference referred explicitly to indigenous peoples and urged states to recognise their right: "to call themselves by their proper name and to express freely their ethnic, cultural and other characteristics" ... The 1983 Conference endorsed "the right of indigenous peoples to maintain their traditional structure of economy and culture, including their language"; recognised "the special relationship of indigenous peoples to their land"; and stressed that land, land rights and natural resources should not be taken away from them" see *Indigenous Peoples – A Global Quest for Justice*, by the Secretariat of the Independent Commission on International Humanitarian Issues (Zed Books Ltd, London, 1987) at 117.

⁸⁰ See General Recommendation XXIII (1997) at para 4 electronic document <www.bayefsky.com/general/cerd_genrecom_23.php> last visited on 24/07/2014.

⁸¹ CERD – "(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the States' cultural identity and to promote its preservation; (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity; (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics; ... (e) Ensure

The Committee has also recognized the “Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work, and remedies”, recommending that “the State party considers the negotiation of a treaty agreement to build a constructive and sustained relationship with Indigenous peoples”.⁸² What is evident from the many Concluding Observations released by the Committee over the years has been a growing tendency to interpret and connect indigenous cultural claims to land claims. This means that, when interpreting indigenous land claims, the land cannot be regarded as a commodity, because it is imbued with cultural holistic significance as well and it is communally owned. In some cases, General Recommendation XXIII and the Committee’s Concluding Observations invoke Art 5.5 of the ICERD guarantees “the right to own property alone as well as in association with others”.⁸³ Continuing this trend, the 1992 Rio Declaration on Environment and Development recognised the vital role indigenous knowledge traditionally had in environmental management and stressed the importance of the preservation of traditional practices.⁸⁴ The following year, Erica Daes, then Chair of the WGIP, stressed that:

... the discovery, use and teaching of indigenous peoples’ knowledge, arts and cultures is inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the

that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages” electronic document <www.bayefsky.com/general/cerd_genrecom_23.php>.

⁸² CERD, 77th Session (2010) “Consideration of reports submitted by States parties under article 9 of the convention: Concluding observations of the Committee on the Elimination of Racial Discrimination” CERD/C/ISL/CO/19-20 electronic document <www.refworld.org/docid/4c15eb842.html> last visited on 24/07/2014.

⁸³ In the Concluding Observations at the 57th Session (Finland, para. 2), the Committee stresses its concern for those activities authorized by the state in Sami reindeer-breeding areas “which may threaten Sami culture and their traditional way of life”. On the same line, the Committee calls upon United States “to recognize the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans”. The Committee does not use the word ‘holistic’ in its analysis, but ‘holism’ is included in the language: “areas of spiritual and cultural significance” see CERD 70th Session, Concluding Observations of the Committee: United States of America at para 29.

⁸⁴ “Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development” at Principle 22 electronic document <www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163> last visited on 11/09/2011

continued transmission of indigenous peoples' heritage to future generations, and its full protection (Principle 6).

In its 53rd session in 2001, the Sub-Commission on the Promotion and Protection of Human Rights⁸⁵ reconfirmed that "indigenous peoples have a distinctive and profound spiritual and material relationship with their lands and with the air, waters, coastal sea, ice, flora, fauna and other resources. This relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities" (Principle 121).⁸⁶ Though the Report stressed the general failure of states to address indigenous issues (willingly or not), it nonetheless proved that indigenous voices were getting stronger, and states were 'kindly' encouraged to address indigenous claims worldwide. To give an example, in 1985, following long-lasting indigenous requests, the Labour government of Prime Minister Bob Hawke, agreed to transfer the title of one of the major Australian tourist attractions, the *Uluru/Ayers Rock* and the Olga Mountains, to Aboriginal ownership. The return's claim was carried out with reference to an unquestionable morality: the nobility of Aboriginal culture as culture, the incontrovertible sacredness of the site, the profanity of self-serving Western greed, the well-documented sin of the past, traditional affiliation with the land, the imperatives of human rights and the inalienable title to a 'quality of life'.⁸⁷ The issue of establishing ownership over the *Uluru/Ayers Rock* thus required the formal proof that traditional Aboriginal owners had spiritual connections to the land, that they were physically using the land, and the Rock represented a fundamental aspect of their cultural and spiritual life. As such, to prove their ownership, Aboriginals had to produce sacred lore from the Dreamtime period

⁸⁵ Titled Prevention of Discrimination and Protection of Indigenous Peoples and Minorities – "Indigenous Peoples and Their Relationship to Land".

⁸⁶ Commission of Human Rights, Erica Irene Daes Prevention of Discrimination and Protection of Indigenous Peoples and Minorities (2001) Doc E/CN.4/Sub.2/2001/21 electronic document <www1.umn.edu/humanrts/demo/RelationshiptoLand_Daes.pdf> last visited on 06/01/2015.

⁸⁷ Elvi Whittaker "Public Discourse of Sacredness: the Transfer of Ayers Rock to Aboriginal Ownership" (1994) 21 2 *American Ethnologist* 310-334 at 311; see also Julie Marcus "The Journey Out of the Centre: the Cultural Appropriation of Ayers Rock" in Gillian Cowlishaw and Barry Morris (eds) *Race Matters* (Aboriginal Studies Pr, September 2000); Gordon Waitt and Others "Fissures in the rock: rethinking pride and shame in the moral terrains of Uluru" *Trans Inst Br Geogr* 32 (2007) at 248–263.

showing how ancestral peoples were using the *Uluru/Ayers Rock* and its surrounding landscapes.⁸⁸

Indigenous land as such is important to indigenous peoples for both its tangible and intangible significance along with the resources it contains. These characteristics are indissoluble. This means that, while land usually belongs to the category of tangible heritage law and common law of property, in the case of indigenous peoples, land claims could be based solely on its intangible character status (such as sacredness). Despite this, according to international and national laws, land is mostly a tangible entity, whose ownership must be addressed on a case by case basis under the law on property inherited from the common law system.⁸⁹ And yet, the intangible significance of the land is today recognized in international (and, often, also national) law.

The UNDRIP clearly refers, inter alia, to the land/cultural rights dichotomy in a few of its articles. In particular, Article 25 explains that indigenous peoples “have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard”. In his article Wiessner states that Indigenous “claims and aspirations are diverse, but their common ground is a quest for the preservation and flourishing of a culture inextricably, and often spiritually, tied to their ancestral land. This specific relationship to the land distinguishes them from other communities or groups dispossessed in terms of power or wealth. The world community has, through domestic and international laws, recognized their special claims, and it has tailored a legal regime for them”⁹⁰ which recognise the complexity of indigenous peoples’ culture and heritage. Important in this regard is, for example, the 2001 Inter-American Court of Human Rights’ decision in the *Mayagna (Sumo) Awas Tingni Community v.*

⁸⁸ Supra at 315.

⁸⁹ See Theodore F. T. Plucknett *A Concise History of the Common Law* (Liberty Fund, 2010); Oliver Wendell Holmes *The Common Law* (Holmes Press, 2012); Tom Bingham *The Rule of Law* (Penguin, 2011).

⁹⁰ Siegfried Wiessner “The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges” (2011) 22 *1 The European Journal of International Law* 121 at 121.

Nicaragua case.⁹¹ In this case, the Inter-American Court on Human Rights held that the State of Nicaragua had deprived the Awas Tingni community of the enjoyment of their ancestral land in violation of Art 21 of the American Convention on Human Rights.⁹² The Court, in its final decision, asserted that Art 21 of the American Convention on Human Rights⁹³ was applicable to the case, and also carefully crafted a broader definition of the ‘right to property’ to include indigenous communal land occupancy in a manner consistent with the provision of Art 21 of the Convention:⁹⁴

Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must

⁹¹ *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgment of August 31, 2001) Inter-Am Court HR, (Ser C) No 79 [2001].

⁹² “... the Mayagna Community has communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory” see *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment of August 31, 2001, Inter-Am Court HR, (Ser. C) No 79 (2001) at para 140(a); “In this case the Court held that the international human right to enjoy the benefits of property, particularly as affirmed in the American Convention on Human Rights, includes the right of indigenous peoples to the protection of their customary land and resource tenure. The Court held that the State of Nicaragua violated the property rights of the Awas Tingni Community by granting to a foreign company a concession to log within the Community’s traditional lands and by failing to otherwise provide adequate recognition and protection of the Community’s customary tenure. It was not enough that the Nicaraguan constitution and laws recognize in general terms the rights of indigenous peoples to the lands they traditionally use and occupy. The Court admonished that Nicaragua must secure the effective enjoyment of those rights, which it had not done for Awas Tingni nor for the vast majority of indigenous communities of the Atlantic Coast region of Nicaragua” see also James Anaya and Claudio Grossman “The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples” electronic document <www.arizonajournal.org/ajicl/archive/AJICL2002/vol191/introduction-final.pdf> last visited on 05/03/2015.

⁹³ American Convention on Human Rights, Article 21: *Right to Property*: 1- “Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2- No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3 - Usury and any other form of exploitation of man by man shall be prohibited by law”.

⁹⁴ 1. “Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. - 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law” at <www.oas.org/juridico/english/treaties/b-32.html> last visited on 14/12/2011.

fully enjoy, even to preserve their cultural legacy and transmit it to future generations.⁹⁵

This case is important because it clearly stresses the importance land has for indigenous communities, and it also shows how States should act to secure the collective rights of indigenous peoples and to “ensure survival of indigenous cultures in accordance with international law”.⁹⁶ In the same case, the Court also recognised that the communitarian traditions of indigenous peoples require a different understanding of what property, land and culture represent for indigenous peoples. In the *Xákmok Kásek Indigenous Community v. Paraguay* case the Inter-American Court stressed that:⁹⁷

For the members of the Xákmok Kásek Community, cultural features like their own language (Sanapaná and Enxet), their shaman rituals, their male and female initiation rituals, their ancestral shamanic knowledge, their ways of commemorating the dead, and their relationship with the land are essential for developing their cosmology and unique way of existing. ... All these cultural features and practices of the Community have been affected by lack of access to their traditional lands. According to the testimony of the witness Rodrigo Villagra, the Community’s displacement from its traditional territory has resulted in “the fact that the people cannot bury [their family members] in their chosen places, ... that [they] cannot return [to those places], that those places have also in some ways become unsanctified [This] forced process means that none of that emotional relationship can exist, neither symbolically nor spiritually.

The Court observed that:⁹⁸

⁹⁵ See electronic document <www1.umn.edu/humanrts/iachr/AwasTingnicase.html> last visited on 14/12/2011.

⁹⁶ James Hopkins “The Inter-American System and the Rights of Indigenous Peoples: Human Rights and the Realist Model” in BJ Richardson, S Imai and K Mc Neil (eds) *Indigenous Peoples and the Law* (Hart Publishing, Portland, 2009) at 157.

⁹⁷ *Xákmok Kasek Indigenous Community v Paraguay*, declaration of Rodrigo Villagra Carron, at para 176-177 electronic document <www.worldcourts.com/iacthr/eng/decisions/2010.08.24_Xakmok_Kasek_v_Paraguay.pdf> last visited on 12/03/2012.

⁹⁸ *Supra* at para 182.

... the Xákmok Kásek Community had suffered several effects to its cultural identity that are fundamentally results of the Community's lack of territory and the natural resources that come with it, which represents a violation of Article 21(1) of the Convention [American Convention on Human Rights] in relation with Article 1(1).

The Court also concluded its argument by saying that:⁹⁹

... the State's duty to take positive measures should be prioritized precisely in relation to the protection of the lives of vulnerable people such as the indigenous.

The Court also ruled that:¹⁰⁰

... the close link that indigenous peoples have to their traditional lands, to the natural resources found that are part of their culture, and to the lands' other intangible elements, should be safeguarded by Article 21 of the American Convention.

In the *Kichwa Indigenous People of Sarayaku v Ecuador* case,¹⁰¹ the Inter-American Court interpreted Art 21 in conjunction with other human rights instruments, and stated that “under international law, indigenous people cannot be denied the right to enjoy their own culture, which consists of way of life strongly associated with the land and the use of its natural resources”.¹⁰² In its negotiations for the creation of the Draft American Declaration on the Rights of Indigenous peoples, the Organization of American States, proposed that: “indigenous peoples have the right to [recover, preserve, use, control, protect, and access] their [existing and future] sacred sites and objects, including their

⁹⁹ *Xákmok Kásek Indigenous Community v. Paraguay*, III Dissenting Opinion - ‘Right to Life’ at para 20.

¹⁰⁰ Supra footnote 69.

¹⁰¹ Inter-American Court of Human Rights Case of the *Kichwa Indigenous People of Sarayaku v Ecuador* Judgement (June 27, 2012) electronic document <http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf> last visited on 02/12/2015.

¹⁰² Supra at 171.

burial grounds, human remains, and relics [located in their ancestral and other territories]” (Art XV.3).¹⁰³ On the same line, the draft of Article XII states that:¹⁰⁴

... Indigenous people have the right to the recognition and respect for all their ways of life, world views, spirituality, uses and customs, norms and traditions, forms of social, economic and political organization, forms of transmission of knowledge, institutions, practices, beliefs, values, dress and languages, recognizing their inter-relationship as elaborated in this Declaration.

While the proposed Article XXIV recognises indigenous peoples’ right to property, Article XXVIII focuses on the intellectual dimension of indigenous peoples’ culture and heritage by stating that:

... the intellectual property of indigenous peoples includes, *inter alia*, traditional knowledge, ancestral designs and procedures, cultural, artistic, spiritual, technological, and scientific, expressions, genetic resources including human genetic resources, tangible and intangible cultural heritage, as well as the knowledge and developments of their own related to biodiversity and the utility and qualities of seeds and medicinal plants, flora and fauna.

In more recent years, other cases have been successful in safeguarding indigenous peoples’ sacred territories. In *Saramaka People v Suriname* (2007)¹⁰⁵ the Court held that the State:¹⁰⁶

... delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people, without prejudice to other tribal and indigenous communities.

¹⁰³ Record of the current status of the Draft American Declaration on the Rights of Indigenous Peoples (Outcomes of the Thirteenth Meetings of Negotiations in the Quest for Points of Consensus, held by the Working Group) GT/DADIN/doc. 334/08 rev 6 corr 1 electronic document <[www.oas.org/council/CAJP/Indigenous%20special%20session.asp#Thirteen Meeting](http://www.oas.org/council/CAJP/Indigenous%20special%20session.asp#Thirteen%20Meeting)> last visited on 05/01/2015.

¹⁰⁴ Supra.

¹⁰⁵ *Saramaka People v Suriname case*, Inter-Am. Court HR (ser. C) No 172 (28 November 2007).

¹⁰⁶ Supra at para 194.

The Court referred to the pre-existing Cases of the *Moiwana Community v Suriname* (2005)¹⁰⁷ and the *Sawhoyamaya Indigenous Community v Paraguay* (2006)¹⁰⁸ by stressing how essential is “the special relationship that members of indigenous and tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the physical and cultural survival of such peoples”, and recognizing that indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land “is not centered on an individual, but rather on the group and its community”.¹⁰⁹ As such, the State must respect and guarantee that the “protection of property under Article 21 of the Convention, read in conjunction with Articles 1(1) and 2 of said instrument, places upon States a positive obligation to adopt special measures that guarantee members of indigenous and tribal peoples the full and equal exercise of their right to the territories they have traditionally used and occupied”.¹¹⁰ Most recently the African Commission on Human and Peoples’ Rights in the *Endorois* case¹¹¹ has confirmed the indigenous peoples’ rights to their lands, territories and resources are part of the corpus of binding human rights law.¹¹²

From the foregoing analysis it emerges that honouring land rights is one of the first step toward the preservation of indigenous cultures and holistic traditions. Indeed, though time has changed, it is still true that holism is and remains one of the most important key features of indigenous cultures.

Even if today international law is still struggling to fully understand the holistic/intangible elements present in indigenous peoples’ cultures, over the

¹⁰⁷ *Moiwana Community v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Court HR (ser. C) No 124 (June 15, 2005).

¹⁰⁸ *Sawhoyamaya Indigenous Community v Paraguay*, *Sawhoyamaya Indigenous Community of the Enxet-Lengua people v Paraguay*, Merits, Reparations and Costs, IACHR Series C No 146, IHRL 1530 (IACHR 2006), 29th March 2006, Inter-Am Court of HR [IAcHR].

¹⁰⁹ Supra at para 89.

¹¹⁰ At para 92; see also Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v Paraguay* (2005) electronic document <www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf> last visited on 04/08/2014.

¹¹¹ *Endorois Welfare Council v Kenya*.

¹¹² See Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya 276/03 (2009) electronic document <www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf> last visited on 26/02/2017

years, it has nonetheless made important step towards a better understanding and protection of indigenous peoples' cultures.

This chapter has demonstrated that culture is an essential element of indigenous traditions that characterise a collectivity, and it is difficult to relegate culture to a specific sector of international law. At the same time, the sacredness and secrecy present in indigenous peoples' traditions do not always help to identify what needs protection and why.

The next chapter will explain that indigenous cultures, and culture in general, over the years, have acquired more importance at national and international level, and human rights and intellectual property laws have come closer in discussing the issues concerning indigenous peoples heritage and traditions, while trying to find workable solutions for the safeguard of indigenous cultures. As it will be seen next, culture itself has a broad, complex meaning that cannot be limited to a clear-cut definition and protected by a single law. Culture, in fact, not only guarantees the integrity of life and the identity of a group of peoples but, at the same time, represents the product of the mind and the creation of a person or a group of people.

Chapter 6

Indigenous Peoples' Culture: In Between International Intellectual Property and Human Rights

This chapter begins with an analysis of the international human rights law which refers to intellectual property. Since its creation, human rights law has evolved by indirectly including subject matters that were initially excluded from its language. Over the years the inclusion of intellectual property within the scope of human rights law has become more evident. According to Gervais,¹ despite the differences between tangible and intangible property, natural law roots are something that intellectual property, and perhaps more acutely copyrights and patents, still share with traditional (Eurocentric) human rights theory.² Art 27 of the Universal Declaration of Human Rights, Art 25 of the International Covenant on Economic, Social and Cultural Rights (see chapter 5) as well as Art 13 of the American Declaration on the Rights and Duties of Man³ can relate to copyright law; whereas Art 1 of Protocol 1 of the European Convention of Human Rights protects the enjoyment of private property.⁴

¹ Daniel J Gervais "Intellectual Property and Human Rights: Learning to Live Together" in Paul LC Torremans (ed) *Intellectual Property and Human Rights* (Kluwer Law International, The Netherlands, 2008).

² "What are the threads that weave intellectual property and human rights together? First, intellectual property rights claim to have roots in natural law, most famously as the Lockean moral desert theory, which held that property rights should be commensurate with 'the sacrifice actually incurred.' According to this view, property is justifiable as a (just) reward for work done to create new works from the existing stock ideas of public domain works, or on a significant, industrially useful improvement on the existing stock technological knowledge" supra at 1.

³ American Declaration on the Rights and Duties of Man (Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948) - Article XIII: "Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author".

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms. The text of the Convention had been previously amended according to the provisions of Protocol No 3 (ETS No 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS No 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No 9 (ETS No 140), which entered into force on 1 October 1994, was repealed and Protocol No 10 (ETS No 146) had lost its purpose.

Article 1 – Protection of property – "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions

Ultimately, Art 31 of the UNDRIP states that indigenous peoples have “the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions”.⁵

The contribution of this chapter to the general discussion is important. It shows, in fact, that an evolution is today taking place within HR and IP laws that has brought together these two traditionally distant realms while trying to fill the gaps that each possess. After all, the right to culture is a human right, because it is essential to the survival and well being of humankind. At the same time, culture is the product of the mind, of its speculation and observation.

6.1 - Indigenous Culture as a Product of the Mind and a Human Right

Only in the last part of the 19th century did indigenous peoples start to sporadically record their traditions in writing using their own language. However, most of indigenous culture and knowledge remained fundamentally intangible and orally transmitted. It has been often questioned how much originality has survived in indigenous traditions after centuries of suppression, persecution and erosion of their cultures. On the other hand, culture as such is a phenomenon that is in constant movement, subjected to changes that are sometimes forced and sudden or, other times, slow and deep. No one can foresee the evolution of a culture. No one can assess with certainty where a given culture appeared first, and which influences shaped its evolution.

It is the author’s belief that any discourse on ‘internal originality’ (as truthfulness of origins present or existing from the beginning) is today irrelevant. This is, first of all, because when ethnocide happens, cultures undergo such a traumatic and forced modification that can deeply affect its characteristics; secondly, it is the perception that indigenous peoples have of their own culture which, alone, should represent the parameter by which any fundamental human, cultural and political right of indigenous peoples should be respected and applied. Moreover, nothing in the UNDRIP, ILO 107 and 169, ICESCR and ICCPR refer to ‘originality’ as

shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

⁵ Daniel J Gervais “Intellectual Property and Human Rights: Learning to Live Together” at 4.

a key element to justify any claim of protection for indigenous cultural and human rights, and the generalization used in many of the articles of the Declaration and the Conventions is a reflection of the broad scope and applicability of the laws.⁶

Hence, this thesis will not enter into any discussion on the originality of indigenous cultures and traditions, intended as the uncorrupted line of transmission of indigenous lore since time immemorial. It would be impossible to ascertain the changes which have happened within indigenous communities, and such changes will substantially depend on specific historical circumstances and geography. On the other hand, it is fairly accurate to say that time and globalization have changed the profile of every society of the world, and not just the indigenous ones. Indigenous peoples are the first to be aware of these changes, and they do not ask to go back to a time that does not exist anymore. They ask to have their fundamental rights respected as 'peoples', and to be left free to decide how to dispose of the culture and resources in their 'custody'. At the Sixth Session of the United Nations Permanent Forum on Indigenous Issues (2007) indigenous representatives firmly reaffirmed:⁷

... our spiritual and cultural relationship with all life forms existing in our traditional territories; Reaffirming our fundamental role and responsibility as the guardians of our territories, lands and natural resources; Recognizing that we are the guardians of the Indigenous knowledge passed down from our ancestors from generation to generation and we reaffirm our responsibility to protect and perpetuate this knowledge for the benefit of our peoples and our future generations; Strongly reaffirming our right to self-determination, which is fundamental to our ability to carry out our responsibilities in accordance with our cultural values and our customary laws.

In saying this, however, while originality per se does not represent a key element in the evaluation of indigenous peoples' culture, TK and TCEs, authenticity remains one of the fundamental parameters in the applicability of Intellectual

⁶ See chapter 4.

⁷ Declaration on Indigenous Peoples' Rights to Genetic Resources and Indigenous Knowledge, Convened at the Sixth Session of the United Nations Permanent Forum on Indigenous Issues (New York, 2007).

Property Rights (IPR) laws.⁸ According to the Western world, it does not matter whether indigenous peoples' knowledge has changed over the centuries; what today is important is how much authenticity indigenous culture can claim to have, and whether such originality has been fixed in physical form or not. Authenticity, originality and fixation are, in fact, the requirements of IPR protection at the national and international level. Since indigenous culture, TK and TCEs are mostly intergenerational, orally transmitted and 'traditional' (especially the sacred and secret practices and the knowledge held by the custodians), they exist mainly in unwritten form, lack originality (apart from the originality that the expression of knowledge holds at the moment of its diffusion, commodification and consequent protection under IPR law), are transmitted over prolonged periods of time, and were never created for financial gain, but rather as a map of the traditions of a given community. Copyright law provides intellectual property protection for artistic original works against unauthorised use or reproduction. In doing so, copyright laws aim to provide creators with exclusive economic rights to exploit their own creative efforts, while encouraging the creative process itself.⁹ In copyright law, these rights are limited in time (normally the life of the creator plus 50-70 years), and belong to the creator or a definable group of creators.

Human rights legal instruments, instead, do not require originality as a parameter for the safeguarding of indigenous cultures; they protect it for the intrinsic value that culture has for the survival of all human societies. Cultural rights are part of the dignity of life as stated in Art 27 of the Universal Declaration on Human Rights (UDHR, 1948).¹⁰ As seen in chapter 5, Art 27 of the

⁸ See chapters 8 and 9.

⁹ "Today's intellectual property laws originate from this era. Thus intellectual property rights are based on the notion that innovation is the product of the creative, intellectual and applied concepts and ideas of individuals. The state grants specific economic rights to inventive people to own, use and dispose of their creations as a reward for sharing their contributions and to stimulate inventive activities" see Terri Janke "Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights" prepared for Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission (1998) electronic document <frankellawyers.com.au/media/report/culture.pdf> last visited on 23/06/2012.

¹⁰ The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A (III) (French) (Spanish) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally

UDHR acknowledges two fundamental human rights: the right for every person to participate in the cultural life – “a right which includes both a passive element of access to culture and an active element of engaging in creative activity; therefore, the right might be called the right to ‘access and participation’”.¹¹ The second right included in Art 27 is the right of authors to “enjoy protection over moral and material interests with respect to their productions – a right which is sort of intellectual property law”.¹² According to Gervais,¹³ Art 27(1) of the UDHR also protects:

... both the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author and users’ right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. The objective of protection embraces at least indirectly the moral theory, while the objective of access is ‘expressed teleologically as a tool to allow everyone to enjoy the arts and to share in scientific advancement and its benefits.’¹⁴

In its complexity, indigenous culture sits in between common law on property, human rights law and intellectual property. It is tangible and intangible, sacred and not, secret and not and mostly communal. Although communal in nature, there is usually an individual, or a group of individuals, who act as custodians of such knowledge. The more the knowledge is sacred, the more it becomes inaccessible and secret and is closely guarded by specific members of the community. As such, culture can rarely be considered as property in the common understanding of the Western concept of property. It is often impossible to connect culture, TK and TCEs to a creator/author or to a specific timeline. They are all holistic aspects of a culture.¹⁵ Both rights included in Art 27 UDHR create a

protected. Universal Declaration of Human Rights GA Res 217, UN GOAR, 3d Sess, UN Doc A/810 (1948) <www.ohchr.org/EN/UDHR/Pages/Introduction.aspx>.

¹¹ Prof Hugh C Hansen (ed) *Intellectual Property Law and Policy* Vol 10 (Hart Publishing, Portland, 2008) at 372.

¹² At 372.

¹³ Daniel J Gervais “Intellectual Property and Human Rights: Learning to Live Together”.

¹⁴ See Gervais at 14-15.

¹⁵ As explained by Daes: “the protection of cultural and intellectual property is connected fundamentally with the realization of the territorial rights and self-determination of indigenous peoples” see Erika-Irene Daes *Discrimination Against Indigenous Peoples: Study on the Protection of Cultural and Intellectual*

package of cultural rights which were later included in more detail into the ICCPR, Art 27, and the ICESCR, Art 15.¹⁶ Both Articles enshrine the right to participate in cultural life; in other words, as pointed out by Dinstein, “cultural life must be regarded as a benefit to which every member of the community is entitled. Culture must not be viewed as an esoteric activity of a superior social elite”.¹⁷ According to the Committee on Economic, Social and Cultural Rights:¹⁸

... only the ‘author’, namely the creator, whether man or woman, individual or group of individuals, of scientific, literary or artistic productions, such as, inter alia, writers and artists, can be the beneficiary of the protection of article 15, paragraph 1(c). This follows from the words ‘everyone’, ‘he’ and ‘author’, which indicate that the drafters of that article seemed to have believed authors of scientific, literary or artistic productions to be natural persons, without at that time realizing that they could also be groups of individuals.

According to the Committee, “under the existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights”.¹⁹ This means that, although the guardians of knowledge have not physically created the TCEs, and they are bound by a ‘duty of care’ to safeguard

Property of Indigenous Peoples Commission on Human Rights – Sub Commission on the Prevention of Discrimination and Protection of Minorities (1993) UN Doc E/CN.4/Sub.2/1993/28.

¹⁶ The human right to benefit from the protection of the moral and material interests of the author is recognized in a number of international instruments. In identical language, article 27, paragraph 2, of the Universal Declaration of Human Rights provides: Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Similarly, this right is recognized in regional human rights instruments, such as article 13, paragraph 2, of the American Declaration of the Rights and Duties of Man of 1948, article 14, paragraph 1 (c), of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (‘Protocol of San Salvador’) and, albeit not explicitly, in article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1952 (European Convention on Human Rights) see Committee on Economic, Social and Cultural Rights, General Comment 17, the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant) UN Doc E/C.12/GC/17 (2006) at 2 electronic document <www1.umn.edu/humanrts/gencomm/escgencom17.html> last visited on 06/01/2015.

¹⁷ Yoram Dinstein “Cultural Rights” (1979) 9 *Israel Yearbook on Human Rights* 58 at 76.

¹⁸ “Human Rights and Intellectual Property” see Committee on Economic, Social and Cultural Rights, twenty-seventh session (2001), “Human Rights and Intellectual Property” Statement by the Committee on Economic, Social and Cultural Rights (29 November 2001) UN Doc E/C.12/2001/15.

¹⁹ “However, as noted above, their entitlements, because of their different nature, are not protected at the level of human rights” see Committee on Economic, Social and Cultural Rights, twenty-seventh session (2001) “Human Rights and Intellectual Property” Statement by the Committee on Economic, Social and Cultural Rights (29 November 2001) UN Doc E/C.12/2001/15 at para 6.

the knowledge represented in the TCE, under Art 15 they are holders of intellectual property rights. In General Comment No 21²⁰ it is stated that:²¹

... the Committee recognizes that the term ‘everyone’ in the first line of article 15 may denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.

Referring to minorities, General Comment No 21 states that Art 15, paragraph 1 (a) of the Covenant also includes the right of minorities and of persons belonging to minorities to take part in the cultural life of society, and also to conserve, promote and develop their own culture.²² This right entails:

... the obligation of States parties to recognize, respect and protect minority cultures as an essential component of the identity of the States themselves. Consequently, minorities have the right to their cultural diversity, traditions, customs, religion, forms of education, languages, communication media (press, radio, television, Internet) and other manifestations of their cultural identity and membership. Minorities, as well as persons belonging to minorities, have the right not only to their own identity but also to development in all areas of cultural life.²³

In Art 15 (c), the ICESCR stresses that everyone has the right “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. The Article, however, does not specify which modalities of protection are granted to authors or legal entities.²⁴ The Article seems indeed to limit the protection to “the moral and

²⁰ Economic and Social Council, Committee on Economic, Social and Cultural Rights General comment No 21 - Right of everyone to take part in cultural life (art 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights) (21 December 2009) UN Doc E/C.12/GC/21.

²¹ Supra at 3.

²² International Covenant on Civil and Political Rights, art. 27; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, at para 1 (1).

²³ Economic and Social Council, Committee on Economic, Social and Cultural Rights General comment No 21 - Right of everyone to take part in cultural life (art 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights) (21 December 2009) UN Doc E/C.12/GC/21 at para 32-33.

²⁴ The Committee observes that, “by recognizing the right of everyone to ‘benefit from the protection’ of the moral and material interests resulting from one’s scientific, literary or artistic productions, article 15,

material interests resulting from their productions”. Art 27 of the UDHR states that the material and moral interests of the author (with respect to his/her work) should be protected under international human rights law. The aim of Art 27(1) is to make it clear that everyone should be put in the position to reach and express culture. In other words, it must be possible to both access culture and participate in its creation.

Globally speaking, apart from ICCPR and ICESCR, several human rights instruments safeguard indigenous peoples’ TK and TCEs either directly or indirectly. Aside from the regulations created ad hoc for indigenous peoples (ILO 157, ILO 169 and UNDRIP), human rights instruments seem to refer and address the issues related to indigenous peoples’ heritage and, indirectly, the role that guardians play in preserving the cultural identity of a community. However, all the laws fail to address the intangible aspect of a culture.

Major international instruments recognising indigenous peoples’ right to safeguard, manage and preserve their TK according to their traditions

The Universal Declaration of Human Rights	Article 27
ICESCR	Article 15, para 1(c)
ICCPR	Article 27
CBD	Article 8(j)
ILO 169	Articles 13, 15, 23
Agenda 21	Paragraph 26.1
The Rio Declaration	Principle 22
UNDRIP	Art 9, 11, 12, 13, 15, 24, 31, 33, 34, 35

They protect the manifestations in material form of such intangible culture, but the idea - the spiritual, sacred force which determined the creation of the culture - remains fundamentally unprotected by HR and IP laws.²⁵

In 1995, the Sub-Commission on Prevention of Discrimination and Protection of Minorities created a set of “Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples” in which it was specified that indigenous

paragraph 1 (c), by no means prevents States parties from adopting higher protection standards in international treaties on the protection of the moral and material interests of authors or in their domestic laws, provided that these standards do not unjustifiably limit the enjoyment by others of their rights under the Covenant” see Committee on Economic, Social and Cultural Rights, General Comment No 17 (2005) UN Doc E/C.12/GC/17 at 4.

²⁵ See chapters 8 and 9.

peoples are the owners of their cultural heritage (in its broad and inclusive definition) and that such heritage is safeguarded by the community as a whole, or by specific members of the community who act as holders/guardians of the knowledge and may decide how to dispose of it.²⁶

As it will be seen in the next chapters, the idea that states should consult with indigenous guardians is very practical. Given the fact that indigenous TK is in good part sacred and consequently kept secret from the rest of the community, only the guardians can express when and how there might be an infringement of their cultural rights and explain how and when the culture they are protecting has been misused. As cultural representatives, the guardians are in the best position to advise states on what is ideally required to protect their tangible and intangible knowledge from any misuse or exploitation. They could suggest legal revisions on the basis of their experience with communal customary laws; or could simply help with the language and the translation of the values that the national and international communities try to safeguard. However, in order to do so, states should extend privileges to indigenous peoples that they have so far resisted extending.

As introduced above, ICESCR realises the importance of the respect for every form of cultural expression and on the subject it states that:

The States Parties to the present Covenant recognize the right of everyone:

- (a) to take part in cultural life;
- (b) to enjoy the benefits of scientific progress and its applications;
- (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Art 15.1).

²⁶ Principle 11 reads that: "Every element of an indigenous peoples' heritage has traditional owners, which may be the whole people, a particular family or clan, an association or society, or individuals who have been specially taught or initiated to be its custodians. The traditional owners of the heritage must be determined in accordance with indigenous peoples' own customs, laws and practices". In the case of a dispute over the custody or use of any traditional element of indigenous knowledge and heritage, Principle 15 affirms that "... judicial and administrative bodies should be guided by the advice of indigenous elders who are recognized by the indigenous communities or peoples concerned as having specific knowledge of traditional laws" see Erica-Irene Daes Principles and Guidelines for the Protection of the Heritage of Indigenous People, Elaborated in conformity with resolution 1993/44 and decision 1994/105 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Economic and Social Council, United Nations (UN Doc E/CN.4/Sub.2/1995/26, GE 95-12808 (E), (21 June 1995) electronic document <<http://ankn.uafer.edu/IKS/protect.html>> last visited on 06/01/2015.

Though in the 1960s the nature of the ICESCR was mainly aspirational and the article reflected the concept of authorship presented by IPR laws, over the years, Article 15 seems to have taken a different route. According to copyright law, an author draws his or her idea for any artistic expression from a well of pre-existing common knowledge, which is potentially available to everyone to be copied. What gives originality to the work is how such knowledge is reshaped into new expressions to be brought into the public domain.²⁷ This seems to suggest that all humanity is linked by a collective knowledge that can be used by anyone. In this context, IPR laws exist to control the circulation of these new ‘productions’ of knowledge from any economic and moral exploitation by someone other than the creator. The limit in time of such protection is directly related to the assumption that no idea is intrinsically new and therefore its economic privileges should be enjoyed by the creator during his lifetime. Copyright laws consider fair to limit the privileges of the ‘information’ to the lifetime of the author plus 50/70 years, and then let it freely circulate in the public domain that initially originated it. However, indigenous peoples might not draw from the same well of common knowledge that Western law refers to, and among indigenous communities there might be a different idea of what can be rightly considered communal. The existence of guardians of knowledge alone seems to prove that not all indigenous knowledge constitutes a background material common and enjoyable by everyone; on the other hand, according to indigenous customary laws, usually knowledge does not need to be fixed in material form in order to exist and be granted exclusive rights; and for indigenous peoples, knowledge does not usually constitute property. The Committee on Economic, Social and Cultural Rights recognises that the creation process can be unique and, at the same time, the

²⁷ “Public domain and IP systems are closely, even integrally, linked. From different policy perspectives, the relationship between a public domain and an IP system may be characterised variously as harmonious synergy; pragmatic, uneven accommodation; or inherent tension. Policy discourse or ideological leanings may favour one side of this coin over the other. But even critiques of the embedded values in the IP system yoke IP law as public domain together: ‘indigenous peoples have rarely placed anything in the so-called public domain, a term without meaning to us ... the public domain is a construct of the IP system and does not take into account domains established by customary indigenous laws’” see Anthony Taubman “The Public Domain and International Intellectual Property Laws Treaties” in Charlotte Waelde and Hector MacQueen (eds) *Intellectual Property – The Many Faces of the Public Domain* (Edward Elgar, Cheltenham UK, Northampton, MA-USA, 2007) at 57; see also WIPO Doc WIPO/GRTKF/IC/5/3 (2003); see also Johanna Gibson “Audiences in Tradition: Traditional Knowledge and the Public Domain” in Charlotte Waelde and Hector MacQueen (eds) *Intellectual Property – The Many Faces of the Public Domain* at 174.

result of interactive processes between creator and environment,²⁸ which is often impossible to define or categorize. However, as restated in general Comment No 21 “the right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (ie non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods)”,²⁹ which means that there should be a limit of interference between states and the cultural life of the people living within the borders. At the same time, states should act as facilitators in the promotion of culture by leaving the people involved in cultural life to directly participating in its management.³⁰

Art 27 of the UDHR and Art 15 of ICESCR state that everyone has the “right to freely participate in the cultural life of the community, to enjoy the arts and to

²⁸ “The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society” see Committee on Economic, Social and Cultural Rights General Comment 21- Right of everyone to take part in cultural life (art 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights) (2009) UN Doc E/C.12/GC/21 at 4. See also note 12 of the General Comment No 21 stating that: Culture is (a) “the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs” (UNESCO Universal Declaration on Cultural Diversity, fifth preambular paragraph); (b) “in its very essence, a social phenomenon resulting from individuals joining and cooperating in creative activities [and] is not limited to access to works of art and the human rights, but is at one and the same time the acquisition of knowledge, the demand for a way of life and need to communicate” (UNESCO recommendation on participation by the people at large in cultural life and their contribution to it, 1976, the Nairobi recommendation, fifth preambular paragraph (a) and (c)); (c) “covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development” (Fribourg Declaration on Cultural Rights, art. 2 (a) (definitions)); (d) “the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups [and] a system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life” see Rodolfo Stavenhagen “Cultural Rights: A social science perspective” in H Niec (ed) *Cultural Rights and Wrongs: A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights* (UNESCO Publishing and Institute of Art and Law, Paris and Leicester).

²⁹ Committee on Economic, Social and Cultural Rights General Comment No 21- Right of everyone to take part in cultural life (art 15, para 1 (a) of the International Covenant on Economic, Social and Cultural Rights) (2009) UN Doc E/C.12/GC/21 at 2.

³⁰ “The decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality. This is especially important for all indigenous peoples, who have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law, as well as the United Nations Declaration on the Rights of Indigenous Peoples” see Committee on Economic, Social and Cultural Rights General Comment No 21- Right of everyone to take part in cultural life (art 15, para 1 (a) of the International Covenant on Economic, Social and Cultural Rights) (2009) UN Doc E/C.12/GC/21 at 2.

share in scientific advancement and its benefits". They both reaffirm the same concepts. Moreover, the same articles are echoed in Art 13.2 of the American Declaration of the Rights and Duties of Man (1948);³¹ Art 14.1 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (1988);³² Art 22 of the African (Banjul) Charter on Human and Peoples' Rights (1981);³³ Art 11.1 and 31 of UNDRIP (2008)³⁴ and Art 5.1 and 8.2 of ILO 169.³⁵

Over the years, human rights instruments and IP law have slowly come to terms with the fact that in indigenous cultures, tangible, intangible, sacred, secret, and land are all expressions of the same culture and cannot be distinguished in different categories of culture and property. At the same time, regulations concerning individualistic human and cultural rights, have started including a collective connotation that was not taken into account in the 1950s and 1960s when such legislation was first created (UDHR, ICESCR and ICCPR). Human Rights bodies (especially in the Americas) have finally applied a 'collective' nature to Art 15 ICESCR and all other regulations referring to indigenous cultural rights and property rights. Whereas, the consistency of recent state practice proves that regulations safeguarding land and cultural property rights, though complex in

³¹ Article 14: "Every person has the right to work, under proper conditions, and to follow his vocation freely, in so far as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family".

³² Article 14.1: "The States Parties to this Protocol recognize the right of everyone: a. To take part in the cultural and artistic life of the community; b. To enjoy the benefits of scientific and technological progress; c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author".

³³ Article 22: "1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development".

³⁴ Article 11: "1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature"; Article 31: "1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".

³⁵ Article 5: "In applying the provisions of this Convention: (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; Article 8.2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle".

nature and meaning, have today crystallized or are in the process of crystallizing into customary international law.³⁶ Referring to the ICESCR, Rosemary Coombe insists that:³⁷

... most States party to the CESC report developments in intellectual property protections pursuant to their reporting obligations under the CESC (rather than under the ICCPR), which would indicate that there is an international practice and potentially a customary norm of recognizing IPRs as cultural rights in international human rights law.

This means that human rights have gained a broader reach for the holistic safeguard of indigenous TK and TCEs that currently compensate for the profound gaps present in the IPR laws. Today, the scope of IPR law is, in fact, still limited to defensive protection rather than active legal legislation for TK.³⁸ Though the initial scope of Art 15 of ICESCR was limited and mostly inadequate in addressing the multifaceted inherent significance of cultural rights as they might manifest in different parts of the world, over the years the article has acquired a collective component that, united with Art 27 of UDHR and Art 27 of ICCPR, recognize the undisputable right for everyone to participate to the cultural life of the community (see previous chapter). As Lenzerini underlines “cultural rights are indeed dependent on the concept of culture, the internationally accepted

³⁶ “While the fact that indigenous peoples’ land rights are protected by customary international law is not reasonably disputable as a matter of positive law, more difficulties arise when it comes to establish the exact practical contours of these rights according to customary international law. In reality, providing an answer to this question appears possible if one takes into account the rationale and purpose of indigenous peoples’ land rights. Indeed, they are not aimed at safeguarding a “property right”, *i.e.* an exclusive absolute right to use, enjoy and dispose of a thing (*uti, frui, fui*) – conceived, according to the common meaning of this expression in the Western world, as a right having first of all an *economic* connotation – but rather as a prerogative with a primarily spiritual, *i.e.* cultural, purpose. In other words, the right in point is functional to the safeguarding – through ensuring the maintenance of the special link between indigenous peoples and their Motherland – of the very distinct cultural identity of indigenous peoples as well as of their survival and flourishing as *different* human communities” see International Law Association Report (Sofia, 2012) at 27-28; see also Siegfried Wiessner “Re-Enchanting the World: Indigenous Peoples’ Rights as Essential Parts of a Holistic Human Rights Regime” (2010) *UCLA Journal of International Law and Foreign Affairs* at 239.

³⁷ “When Article 27 of the UDHR was negotiated, controversy arose over the inclusion of the right to benefit from the moral and material interests of the author. Some members of the Commission on Human Rights argued that it was not a right applicable to everyone, adding that it also felt that patents and copyrights could sometimes become an obstacle to the possibility for others to enjoy the benefits of scientific progress and its applications. In the end, however, it was included” see Rosemary J Coombe “Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity” (1998) 6 *1 Indiana Journal of Global Legal Studies* at note 21.

³⁸ See chapters 8 and 9.

definition of which shows how inextricably its individual component is linked to its collective element".³⁹ According to the Mexico City definition (1982):⁴⁰

... culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.

Given the fact that the right to intellectual property is a cultural right, because it seeks to protect the cultural manifestation of an individual or a group of individuals, it might be considered as being strictly related to Art 15 ICESCR. The same concepts are expressed in Art 27 of the UDHR and in Art 13 on "Right to the benefits of culture" of the American Declaration of the Rights and Duties of Man.⁴¹ The enjoyment of one's own culture and the production of the mind is part of the entitlement of indigenous peoples to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life. Art 2 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) recognises the fundamental character of Art 2 and 27 of the UDHR and stresses that:

... cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed.

The Convention has an inclusive approach, by recognising that:

³⁹ Federico Lenzerini "Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of their Traditional Knowledge" at 3 electronic document <www.culturalrights.net/descargas/drets_culturals263.pdf> last visited on 10/12/2015.

⁴⁰ UNESCO Mexico City Declaration on Cultural Policies World Conference on Cultural Policies Mexico City (1982) at Preamble.

⁴¹ Art 13: "Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author".

... no one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.⁴²

This means that, over the years, international law has been harmonized and has become a coherent corpus of legislation that supports and completes itself by integrating and extending the existing laws while forming new legislation. By addressing cultural rights and property rights over the expressions of such culture, Art 15 ICESCR, seems to succeed in transcending the limitations proposed by IPR laws and becomes a binding instrument that can be used to safeguard indigenous peoples' TK and TCEs. General Comment No 17⁴³ explicitly emphasizes that:⁴⁴

... human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole. In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else.

The fact that knowledge and culture are inalienable rights that trespass to the IPR side of the law only proves the importance these rights have for the people

⁴² See Article 2.1 – Guiding Principles.

⁴³ General Comment No 17: "The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (art 15, para 1 (c) of the Covenant)" see UN Committee on Economic, Social and Cultural Rights (ICESCR) (2006) UN Doc E/C.12/GC/17 electronic document <www.refworld.org/docid/441543594.html> last visited on 15/07/2015.

⁴⁴ Committee on Economic, Social and Cultural Rights, General Comment No 17, the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant) UN Doc E/C.12/GC/17 (2006) at para 2.

concerned. On the other hand, General Comment No 21⁴⁵ seems to understand the difficulty in finding an inclusive description of 'culture' which could be a working definition of every conceivable form of art, both holistic and non-holistic.⁴⁶ This means that every culture in the world has a right to exist and be preserved. The fact that people should participate in the cultural life of a community means that such culture is available. In this case 'availability' seems to imply the legitimacy of existing cultural management within the community that preserves and maintains the culture, which can be understood as the right for communities to manage their own culture according to their own traditions and specificities. Because culture needs to be managed somehow in order to exist, the role of the guardians seems to fit into the process of the enjoyment of one's own culture. If, in fact, there is no culture, there is no enjoyment of the culture. In many indigenous societies, traditional knowledge holders and the guardians of knowledge are the personality in charge of the preservation and consequent availability and adaptability of traditional forms of knowledge. According to the words of the Vienna Declaration and Programme of Action:⁴⁷

... while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Similarly, the Universal Declaration on Cultural Diversity stresses that:⁴⁸

... the defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity', which means that every state should be committed

⁴⁵ Committee on Economic, Social and Cultural Rights, General comment No 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a)) UN Doc E/C.12/GC/21 (2009) electronic document <www.refworld.org/docid/4ed35bae2.html> last visited on 15/07/2015.

⁴⁶ "The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity" see Committee on Economic, Social and Cultural Rights, General comment No 21: Right of everyone to take part in cultural life (art 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 at 3.

⁴⁷ Vienna Declaration and Programme of Action at para 5 electronic document <www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> last visited on 15/07/2015.

⁴⁸ See Universal Declaration on Cultural Diversity at Article 4.

to the respect of 'human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.

In this case a violation of human and cultural rights occurs when there is:

... a failure to take appropriate steps to achieve the full realization of the right of everyone to take part in cultural life, and the failure to enforce relevant laws or to provide administrative, judicial or other appropriate remedies to enable people to exercise in full the right to take part in cultural life.⁴⁹

The idea of safeguarding the cultural rights of indigenous peoples is also inherently included within their right to self-determination as stated in common Art 1 of ICCPR and ICESCR.⁵⁰ Given the fact that indigenous peoples have a right to self-determination and a right to the enjoyment and preservation of their cultural rights, and given the efforts that human rights laws and intellectual property laws have made to come closer in their scope to safeguarding indigenous peoples' interests, it seems fair to question if they have actually succeeded. Considering indigenous intangible culture, such as sacred practices and territories imbued with ancestral spiritual values, it is fair to question who today owns and manages indigenous culture. Because, as will be explored next, indigenous peoples do not always own and control their own culture, especially their sacred and secret knowledge.

⁴⁹ Committee on Economic, Social and Cultural Rights, General comment No 21: Right of everyone to take part in cultural life (art 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/21 at 63.

⁵⁰ "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

6.2. - Who Owns Indigenous Culture?

Before entering into any further discourse on indigenous peoples' TK and TCEs, it is important to understand what constitutes indigenous property and who owns indigenous culture. Is it the individual creator or the whole community? Or rather a selected group of people, such as the guardians, the holders or the elders of the community who have access to the knowledge? Is culture the property of a specific people or nations? Does it belong to those who, without authorisation, have exploited the knowledge and brought it into the public domain? Or is it representative of a universal heritage of humankind?

As of today, the answer to the questions is not necessarily and always straightforward, and in recent years those same questions have caused many hot debates at both national and international levels between indigenous peoples' representatives and states. The truth is: indigenous peoples do not always own their cultural property.

Some scholars argue that in indigenous societies the concept of property is non-existent, therefore indigenous peoples do not own their culture. It is true that the concept of property for indigenous peoples might differ from the Western conceptualization of what constitutes property.⁵¹ The same idea applies to the notion that traditional property rights are always collective or communal in character. As Dutfield clarifies,⁵² it is true that in indigenous communities there are shared responsibilities for land and territories and families or individuals may hold "lands, resources or knowledge for their own use"; however "ownership is often subject to customary law and practice and based on the collective consent

⁵¹ "The objects and entitlements of ownership vary across legal systems, as does the degree of private access to public property and vice versa. In the Anglo-American system, the roots of property law lie in centuries past, when ownership of land or 'real property' determined social status; legal rights and even hereditary titles were (and are) linked to particular geographic areas or estates. Land, as a result of its social significance and permanence, is therefore the paradigmatic form of property in our legal system. With the Industrial Revolution and the increase in vast personal fortunes not tied to real estate, 'personal property' in the form of moveable goods or liquid assets increased in importance as an indicator of success or status. 'Intellectual property', or ownership of ideas that can be expressed or embodied in some tangible form, is a relative newcomer to the realm of property. Among its distinctive features is the element of human creativity in its formation; unlike real property, intellectual property cannot simply be claimed or annexed" see Susan Scafidi *Who Owns Property?* (Rutgers University Press, New Brunswick, 2005) at 159-160.

⁵² Graham Dutfield "Protecting Traditional Knowledge: Pathways to the Future" (International Centre for Trade and Sustainable Development – ICTSD, Genève, 2006) at 13.

of the community”.⁵³ Dutfield explains that: “customary rules governing access to and use of knowledge not necessarily differ all that widely from Western intellectual property formulations, but in the vast majority of cases they most certainly do. They also differ widely from each other”.⁵⁴ And yet, this does not mean that property rights do not exist in traditional societies. According to Tsosie⁵⁵ the “rights to ownership and access within Native and Western cultures are developed according to a set of cultural norms that is markedly different”. The two sets of cultures, in fact, not only do not share a uniform understanding of the past, but they have a different understanding of what constitutes sacred culture and why such culture needs secrecy and guardianship. The two cultures also do not share a similar understanding of what constitutes tangible and intangible sacred/secret heritage and culture. What can then be rightly defined as indigenous cultural property? The question is very delicate because, as pointed out by Tsosie:⁵⁶

... indigenous property systems often encompass notions of the ‘sacred’ reflecting tribal worldviews that see a special relationship between the people and the rest of the universe. ... Moreover, Native cultural resources often have a tangible component and an intangible component, which are inseparable.

In the words of UNESCO, cultural property consists of:⁵⁷

... property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of

⁵³ Dutfield at 13.

⁵⁴ Graham Dutfield “Legal and Economic Aspects of Traditional Knowledge” in Keith E Maskus and Jerome H Reichman (eds) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, 2005) at 502.

⁵⁵ Rebecca Tsosie “Who Controls Native Cultural Heritage?: ‘Art’, ‘Artefacts’, and the Right to Cultural Survival” in James AR Nafziger and Ann M Nicgorski *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce* (Martinus Nijhoff Publishers, The Netherlands, 2009) at 6.

⁵⁶ “The primary value of certain objects may be spiritual, and thus, the purpose of the object and the duties associated with appropriate care of the object may be very incompatible with Western notions of ownership, which tend to center upon material profit and utility” see Rebecca Tsosie “Who Controls Native Cultural Heritage?: ‘Art’, ‘Artefacts’, and the Right to Cultural Survival” at 32.

⁵⁷ Article 1 - Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs ; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections.

In her Principles and Guidelines,⁵⁸ Daes specifies that, contrary to the modern idea of authorship as established by modern IP laws, indigenous peoples' traditional culture and heritage (inclusive of TK and TCEs) "has traditional owners, which may be the whole people, a particular family or clan, an association or society, or individuals who have been specially taught or initiated to be its custodians", and because of the difficulty of isolating specific creators of intellectual property, "the traditional owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices".⁵⁹ Daes refers to the "traditional owners of heritage" and not to the "creators of heritage" because, as pointed out at differed stages in this thesis, those who own the culture in indigenous societies do not necessarily coincide with the person or persons who actually created the knowledge and the cultural expression.

⁵⁸ Erica-Irene Daes Principles and Guidelines for the Protection of the Heritage of Indigenous People, Elaborated in conformity with resolution 1993/44 and decision 1994/105 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Economic and Social Council, United Nations (UN Doc E/CN.4/Sub.2/1995/26, GE. 95-12808 (E), 21 June 1995) electronic document <<http://ankn.uaf.edu/IKS/protect.html>> last visited on 28/01/2015.

⁵⁹ Supra.

For example, the Native American Graves Protection and Repatriation Act (NAGPRA, 1990),⁶⁰ defines 'cultural patrimony' as meaning "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native".⁶¹ The Act carries on defining 'the right to possession' as possession "obtained with the voluntary consent of an individual or group that had authority of alienation".⁶² However, like for most of the legislation referring to indigenous peoples, NAGPRA tends to protect the tangible aspect of Native American cultures (such as ancestral human remains and cultural objects) and neglects that intangible culture which does not fit into existing categories of intellectual property defined by domestic laws. In fact, NAGPRA's main concern is to protect and to return to the appropriate tribes (when possible) human remains, funerary objects, sacred objects and objects of cultural patrimony as long as they are in the collections of federal agencies or museums.⁶³

According to Western principles, property implies a privatization deriving from market models and ideals that apply a value (mostly economic) to the property. The 'value', as defined by Western capitalism, for indigenous communities can only exist if indigenous knowledge is converted into property. Therefore, if indigenous communities aim to enjoy privileges deriving from their TK and TCEs, they must reproduce or translate their knowledge into forms of property which are not only acceptable for the parameters of community customary laws, but also for the modern laws of intellectual property. The process just described may be easy in theory, if the traditionality of the cultural expressions of indigenous

⁶⁰ Native American Graves Protection and Repatriation Act, Public Law 101-601--NOV. 16, 1990 Native American Graves Protection and Repatriation Act [104 STAT. 3048 PUBLIC LAW 101-601--NOV. 16, 1990] Public Law 101-601 101st Congress (Nov. 16, 1990).

⁶¹ NAGPRA electronic document <<http://www.nps.gov/nagpra/mandates/25usc3001etseq.htm>> last visited on 28/01/2015.

⁶² "The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as [104 STAT. 3050 PUBLIC LAW 101-601--NOV. 16, 1990] applied in section 7(c), result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 USC 1491 in which event the 'right of possession' shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains" electronic document <<http://www.nps.gov/nagpra/mandates/25usc3001etseq.htm>> last visited on 28/01/2015.

⁶³ Supra.

peoples is not considered at all along with the sacredness and secrecy of such knowledge. As we have seen, indigenous culture is often totally different in form and in perception to what constitutes intellectual property in the Western legal framework. Consequently, such translation into Westernized forms of expressions is for indigenous peoples realistically difficult, if not impossible. On the other hand, without translation into Western forms of property, indigenous culture, TK and TCEs remain often vulnerable to capitalist markets and unscrupulous entrepreneurs who can copy, reproduce or steal the unfixed traditional knowledge of indigenous peoples and make a business out of it. Going back in time, when the phrase 'cultural property' entered the English-speaking world, it did not include in its meaning the cultural property of indigenous peoples, indigenous guardianship, TK and TCEs. Though the term was already in use in the Italian civil law under 'beni culturali' and in the French-speaking countries as 'biens culturels', the English version was not a well-established legal terminology in the Common Law.⁶⁴ Indeed, cultural property is a Western concept with commercial connotations and directly linked to property law and, therefore, to the Western idea of ownership. Cultural property and its subcategories TK and TCEs include the rights to land (real property linked to indigenous ancestral lands), personal property which, in turn, includes everything apart from the land, and the fruits of the intellect (intellectual property law). In addition to that, the idea of culture and heritage gives continuity to the concept of property as evocative of something guarded, transmitted, or handed down. The beneficiaries of the knowledge that generates the cultural property are not necessarily the persons who create or safeguard it (guardians); instead, the knowledge is traditionally created and safeguarded because its characteristic feature rests in its transmission. Moreover, an answer to the question 'who owns indigenous cultural property?' is fundamental to address where the rights over the property rest on, who the beneficiaries of the

⁶⁴ For further information on the subject see Lyndel V Prott and Patrick J O'Keefe "'Cultural Heritage" or "Cultural Property"?' (1992) 1 *International Journal of Cultural Property* 307-320; Manlio Frigo "Cultural Property v. Cultural Heritage: A 'Battle of Concepts' in International Law?" (2004) 86 *IRRC* 854.

rights are and how these rights can be safeguarded and implemented at the national and international level.⁶⁵

6.3 – Cultural Property: A Problem of Definition.

Even if the last 60 years have slowly addressed the issue, still today the idea of ‘cultural property’⁶⁶ remains a contradictory concept. Modern laws on cultural property place moral and economic value on cultural products and expressions, providing a legal framework that should safeguard the management of such cultural property, and then use standardised regulations for its protection framed in a Western conceptualization of ‘property’. In doing so, a good part of the cultural production of the world is left outside the existing legal framework, being the laws phrased in ways that are not inclusive of non-Western ideas of cultural property (as discussed in previous chapters). To make things worse, the very concept of culture and property are fundamentally contradictory, and to put them together does not simplify the problem.

In general, property is fixed, owned, controlled by the owner, and it is alienable. It is the right of someone to do what one wishes with what one owns, thereby denying or excluding others from benefiting from the property. Culture, on the other hand, can be unfixed, dynamic, created or controlled by a multitude, inalienable because regulated by customary laws that say so, and may not be owned by anyone, but rather be the heritage of a culturally defined group of people or guardians and, as such, subjected to changes following the cultural changes occurring within the group. The idea of putting the two concepts

⁶⁵ For reference see Michael F Brown *Who Owns Native Culture?* (Harvard University Press, Cambridge-Massachusetts, 2003) and Susan Scafidi *Who Owns Culture?* (Rutgers University Press, New Brunswick-NJ, 2005).

⁶⁶ The phrase ‘cultural property’ was first used in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict - Article 1: “For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a); (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centres containing monuments’”.

together brings into the realm of culture a solidity and staticity that culture does not possess. It also cuts off any 'distinctive culture' from any evolutionary pattern. Culture normally reflects the identity of a group or a person in a moment in time; as such, it is subjected to changes that follow the life of the group, or person, who created it. It is also subjected to a constant process of redefinition that is not static in time, and that makes it difficult to commodify or to simply consider it as commodification. According to Art 1 of the Universal Declaration on Cultural Diversity (UNESCO 2001):⁶⁷

... culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.

In the case of indigenous peoples, not only does all that was said above apply, but other features of indigenous cultural expressions make it difficult to relate to the idea of cultural property. Indigenous culture is holistic and traditional: which means that it can be of old lineage and transmitted uncorrupted for a very long time, or it may have changed dramatically in a short period of time as a reaction to external or internal factors affecting the community (eg colonization, natural disasters, wars etc). At the same time, in the age of globalization, most of the traditional cultures of indigenous peoples are today mixed with other human cultures of the world; this cultural interaction has reshaped indigenous traditional features into something resembling a cultural hybrid. In his book *Who Owns Native Culture*,⁶⁸ Brown approaches the dilemma of indigenous cultural property and analyses its mixing with the modern society. He definitely considers indigenous peoples as members of the global community and argues that most of the loss of indigenous knowledge and the injustices faced by indigenous stakeholders are caused by the inequity of economic, political and legal

⁶⁷ See Universal Declaration on Cultural Diversity, Article 1.

⁶⁸ Michael F Brown *Who Owns Native Culture?* (Harvard University Press, Cambridge-Massachusetts, 2003).

resources that appropriators have compared to the often limited ones that indigenous groups retain.⁶⁹ In fact, even when indigenous property rights over knowledge are asserted, they are often insufficient to prevent abuses when the knowledge has entered the public domain and cannot be controlled any longer by indigenous holders.⁷⁰ Arguably, in this case, what is relevant is not whether and when the knowledge entered the public domain, but what circumstances determined its entrance into the public domain. Was the knowledge stolen? Was it unlawfully taken without the consent of the community? Were the persons in charge of the transmission of the knowledge aware that what they were protecting was about to be shared by the world at large? Why was the knowledge taken in the first place? For its economic value, or for other 'altruistic' reasons? Will indigenous communities be the users and beneficiaries of the knowledge that entered the public domain?⁷¹

Modern societies give an economic value to everything, and value everything, culture included, on the basis of the economic importance and profit that such cultural property might have once entering the market. Most indigenous peoples, on the other hand, often have no interest in the commodification of their culture and TK, because, to them, any expression of culture has a spiritual and traditional value that might have nothing to do with the capitalist idea of economic profit or commercial profitability. Obviously, once their knowledge is unlawfully misappropriated and commoditized, indigenous TK holders, or indigenous custodians/guardians of the knowledge, might resort to making efforts to reclaim proprietary rights over the knowledge sold or about to enter the market. In this case, they define their culture as indigenous 'cultural property' or TK, because only by marrying the wording of the Western legal system might they get a chance to see the rights allocated to them. This does not mean that they have traditionally organised their culture and TK into property to begin with, or ever considered their culture as the common heritage of

⁶⁹ "The inequity lies instead with the appropriators' social capital, which leaves them better positioned than their indigenous counterparts to reap financial reward. This is manifestly unfair, but it is symptomatic of broader social realities, not of failure of intellectual property law as such" see Brown *Who Owns Native Culture?* at 236.

⁷⁰ For further information see Graham Dutfield *Protecting Traditional Knowledge and Folklore* ICTSD – UNCTAD Project on Intellectual Property Rights and Sustainable Development (2003).

⁷¹ These questions will be answered in detail in the last Chapter on Privacy and Confidentiality Laws.

humankind. When indigenous peoples engage in defensive mechanisms to invoke IP rights (mostly copyright and patents) allocated to a TK or cultural expression that has been unlawfully misappropriated, such defensive mechanisms have the perverse effect of placing TK in the public domain, so that not only the patent or copyright holder is free to use the knowledge, but anyone else who wishes to. Obviously, this is especially dangerous and offensive for the sacred and secret knowledge.⁷² Arguably, custodianship and guardians' rights and responsibilities do not cease to exist just because the knowledge has entered the public domain. Taubman recognises that "from the perspective of some TK holders at least, TK did not 'fall' into the public domain: it was pushed there, unjustly, either by access and publication that overrode customary law or otherwise by the operation of an IP system that inadequately respects TK".⁷³

Not only is the idea of public domain status an idea that evolved in Western societies and is not reflective of a global agreement among all the different societies and diverse cultures of the world, but the public domain status is often the result of a disclosure of information without the prior-informed consent of the creator or the guardian, and with the consequent breach of the customary laws of a given community.⁷⁴ In their article "Clarifying Cultural Property",⁷⁵ Carpenter and others give the example of the Quileute Nation (from the Pacific North West region of the United States), who before the Twilight mania⁷⁶ and the following movies, was mostly unknown to the general public, and has now become an international commercial phenomena. In just about seven years, an unknown Indian tribe has become famous all over the world, with entrepreneurs, tourists and fans that go to the Quileute's reserve to steal rocks, take souvenirs and film graves of deceased tribal elders. Of all the books and

⁷² See Graham Dutfield supra at footnote 70; see also Graham Dutfield *Intellectual Property Rights and the Life Science Industries: a Twentieth Century History* (Ashgate, Aldershot, 2003); Graham Dutfield *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Routledge, UK, 2004); Graham Dutfield *Protecting Traditional Knowledge: Pathways to The Future* (International Centre for Trade and Sustainable Development (ICTSD), Genève, 2006).

⁷³ Antony Taubman "Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge" in Keith E Maskus and Jerome H Reichman (eds) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, 2005) at 545.

⁷⁴ See last chapter.

⁷⁵ Kristen A Carpenter and others "Clarifying Cultural Property" (2010) 17 *International Journal of Cultural Property* 581-598.

⁷⁶ Twilight is a series of four vampire-themed fantasy romance novels by American author Stephenie Meyer. For further information see Wikipedia.com at <http://en.wikipedia.org/wiki/Twilight_%28series%29>.

souvenirs made about the Quileute Nation, little or nothing goes to the Indian tribe which, according to Carpenter, is using the little economic resources they have to fight to protect their ancestral lands. With a choice between silence and losing, and commodifying their culture in their own terms, the Quileute Nation decided to make use of a process they were not able to stop. Recently they have started controlling the circulation of their culture and TK⁷⁷ while, at the same time, they are trying to correct all the misconceptions on the history and traditions of the tribe given by the author of the Twilight Saga. To the world, the Quileute Nation is a brand producing cultural products of great value for the increasing demand of the market; for the peoples of the Quileute Nation, the market is exploiting their ancestral knowledge while stealing their cultural heritage.

Unfortunately, the only use indigenous peoples can make of intellectual property law, is as a defensive mechanism. Indigenous knowledge is excluded from the mainstream of Western referentiality because Western laws do not recognise the authority of the guardians and TK's holders, and their ownership over the knowledge (sacred and not). Part of the problem resides in the fact that indigenous guardians and TK's holders do not produce or own the knowledge.

It is today recognised that property is not about absolute dominium in the strict meaning of the word; it however entails specific rights that, for economic reasons, limit the action of others in relation to the product. Guardianship, on the other hand, limit the action in relation to the product to safeguard the knowledge embodied in and by the product, and not for the economic profit it might embody. As we have seen, the idea of intellectual production and property comes from the assumption that human beings tap their ideas from an intellectual reservoir shared by humanity at large. As such, ideas might not be totally original per se. Copyright therefore does not protect ideas, but rather the unique way these ideas give birth to a product of the intellect through a creative

⁷⁷ "Traveling across our great country and observing other native tribes commercially marketing their wares in a successful and respectful manner motivated us to explore the concept of promoting culturally appropriate authentic Quileute items online" ... "Though we began this exploration prior to the Twilight phenomenon, I am delighted for the artisans in the village who have a global audience interested in owning a part of authentic Quileute culture, and thrilled we can share our art with fans and collectors who are unable to visit LaPush personally" said Chairwoman Anna Rose Counsell-Geyer <www.peninsuladailynews.com> at <www.peninsuladailynews.com/article/20100331/news/303319988>.

process. Does that mean that the person owns the product but not the idea? If everybody taps into the same reservoir, but only few can create something of moral and economic value out of it, it means that the idea (or the way information is assembled) has an intrinsic authenticity that makes it different from all other ideas contained in the reservoir. In theory, one should own the idea as much as the product, because only that idea and its usage gave birth to that product of the mind. However, given the difficulty of assessing property rights over intangible forms of knowledge, such as ideas, IP laws limit their protection to the product of the mind, and not the ideas.

As we have previously seen, in indigenous societies culture is organized, produced and considered differently. In arguing this case, Taubman points out in his article⁷⁸ that the knowledge component inherently present in every TK should be regarded as integral with:

- i) practices that define custodianship or the nature of community ownership;
- ii) the rights and responsibilities that determine custody, access rights, means of dissemination and preservation of knowledge; and
- iii) the customary mode in which traditional knowledge is passed on between generations.

In other words, only a respect for customary laws and the creation of effective *sui generis* systems built on the observance of indigenous customary laws, could understand and accommodate indigenous cultural claims. Given the fact that indigenous guardians and TK holders have traditionally held authority over the knowledge and its management within the community, and given the fact that indigenous knowledge does not necessarily come from the same well of ideas that gives birth to the so called 'products of the intellect', Western societies

⁷⁸ Antony Taubman "Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge" at 538.

should take into consideration the *opinio juris*⁷⁹ of indigenous custodians in the management of indigenous resources.⁸⁰

Western societies would never leave the management of their cultural and natural resources to indigenous peoples; why then should the other way round be considered legitimate? In this contradictory scenario of IP laws and indigenous TK holders, it is not about who is right or wrong, or whose culture is original and legitimate. There is no right or wrong. The question is: can a philosophy of life and what comes with it be considered right just because the capitalist part of the world say so? The issue at stake here is as much legal as ethical and philosophical, and it has nothing to do with a romanticisation of indigenous peoples' cultures.

This thesis has no interest in defining which culture is better; or if any culture (Western or indigenous) has a grounded legitimacy in existing. The fact that indigenous culture is fundamentally different from the Western idea of culture, from the creative process to the product, is an undisputable truth. To force indigenous culture and cultural expressions into Western parameters is unrealistic and fundamentally against indigenous rights to freedom and self-determination. In her book *Community Resources*,⁸¹ Gibson gives an exhaustive description of the issues faced by indigenous communities in the face of the world intellectual property regime. She explains that the world is unprepared to include indigenous peoples' knowledge in the system of IP law, and she gives important reasons for that that are shared by many scholars. Her analysis is very thorough; however, there are few interpretations that seem misleading. When talking about indigenous TK and TCEs, she uses the words 'community resources' to inclusively refer to indigenous claimants vs IP law: two words that alone mean all and nothing. The etymology of the word 'resource' comes from the French *ressource* and "means of supplying a want or deficiency" and *resourdre* "to rally,

⁷⁹ "In customary international law, *opinio juris* is the second element (along with state practice) necessary to establish a legally binding custom. *Opinio juris* denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question" see electronic document <www.law.cornell.edu/wex/opinio_juris_international_law> last visited on 05/02/2015.

⁸⁰ See the case study of the next chapter.

⁸¹ Johanna Gibson *Community Resources* (Ashgate, UK and USA, 2005).

raise again” and from the Latin *resurgere* “rise again”.⁸² The use of resources as “a country's wealth” was recorded for the first time in 1779. The word is today connected to “resources, money, or any property that can be converted into money, assets”. Community comes from the Latin word *communitatem* (nom *communitas*), “community, fellowship”; from *communis* “common, public, general, shared by all or many”.⁸³ The two words together seem to refer to “the common wealth shared by all or many”; which implies a tricky generalization. Every indigenous society, in fact, manages its own resources in a way that is traditional to the laws of the community. And these laws can vary greatly from one community to another.

Gibson’s book presents many insights and analysis on indigenous TK and TCEs and the modern system of IPR law. However, as for many other books on the market analysing the same topics, Gibson does not take into account how crucial the complex stratification of indigenous society is for any in-depth study on indigenous TK and TCEs. It is in the stratification of most of indigenous societies that the dilemma of today’s ownership of indigenous cultural property resides. The community at large is, in fact, rarely responsible for the management of TK, and to consider the whole community as a legal personality is misleading and in the long run will hinder the introduction of effective *sui generis* legal mechanisms for the safeguard of indigenous cultures. In addition to that, indigenous peoples are very often ignorant of the economic and legal discourses that happen outside of their microcosm. They have relied on their customary laws for centuries and are often unconvinced why something that has worked for them for such a long time should be replaced by unfamiliar regulations that protect the economic interests of societies outside their milieu.

The UNDRIP does not generally enter in the debate concerning indigenous cultural property. However, in Art 11(2) it encourages states to provide redress

⁸² See definition at

<www.etymonline.com/index.php?allowed_in_frame=0&search=resource&searchmode=none last visited on 15/07/2015.

⁸³ Latin *communitatem* “was merely a noun of quality ... meaning ‘fellowship, community of relations or feelings’, but in med.L. it was, like *universitas*, used concretely in the sense of ‘a body of fellows or fellow-townsmen’” [OED]. An O.E. word for ‘community’ was *gemænscepe* ‘community, fellowship, union, common ownership’, probably composed from the same PIE roots as *communis*. Community service as a criminal sentence is recorded from 1972, Amer Eng Community college is recorded from 1959” electronic document <www.etymonline.com/index.php?allowed_in_frame=0&search=community&searchmode=none>.

for the wrong done using effective mechanisms with respect to indigenous “cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs”. In its general phrasing, the Declaration does not get into an in-depth analysis of what constitutes property in international law and for indigenous peoples; but, again, it refers to indigenous territories, lands and resources which indigenous communities have “traditionally owned” or “occupied” without explaining the legal implication of that statement. The same applies when the Declaration does not give any basic explanation of what, in international law, means a land “traditionally owned” and which regulations, if any, could be used to implement what is written in the Article. In Art 31, the UNDRIP states that indigenous peoples have the right to “maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions”. Again, the Declaration uses ambiguous language. It confirms that indigenous peoples have the rights to protect and develop their intellectual property over such cultural heritage, but it does not stress that any heritage, TK or TCEs of indigenous peoples is indeed indigenous property. The Declaration, which is today the most comprehensive of the instruments dealing with indigenous peoples’ rights, sometimes remains an elusive guide to who the beneficiaries of the rights are (in this case indigenous peoples), and how those rights can be respected or implemented. In addition, the complex strata of indigenous societies makes it difficult, if not impossible, to resolve the issue. While the issue of indigenous proprietary rights is overall debated at national and international levels, with few results, to address such rights in an indigenous cultural system which customarily does not possess the culture, but uses it and safeguards it, becomes close to impossible; especially in fora guided by Western standards and controlled by Western laws where guardianship is an alien concept. In her book Gibson justifies any discourse on ‘ownership’ by underlying its centrality in any discussion on intellectual property law. Though ownership in this case has not much to do with total dominium, but rather ‘control’ over access to the knowledge, many indigenous communities are marginalized from any effective protection of their intellectual property, simply

because they cannot prove the ownership over the knowledge. Gibson observes that denying ownership rights to indigenous communities “is to deny Indigenous and traditional practices and relationships of custodianship. It is to deny the community’s right to respect through its knowledge (as culture rather than as an informational commodity) if that community is unable to access and practise traditional systems and customs of custodianship and guardianship ...”.⁸⁴ The best solution for indigenous peoples is to keep their cultural property away from the market. However, with the technological expansion of cultural limits, to keep sacred knowledge secret has become for indigenous peoples more and more challenging. In a complex scenario, Carpenter suggests to resort to static stewardship which could become of help by focussing on:⁸⁵

1. an interest in conserving a sacred resource from over use or pollution;
2. an interest in placing an object to rest, such as funerary remains;
3. an interest in maintaining the physical and spiritual integrity of an object by imposing rules against alienability, such as tribal rules that prohibit the sale of sacred objects to nontribal member; and
4. an interest in ensuring continued access to and the preservation of a cultural resource for prayer, like a sacred site.

Although the solutions presented above seem sound and feasible, however, they refer to the tangible aspect of the sacred knowledge held by the custodians. What happens in the case of intangible knowledge? How can IP laws accommodate the intangible, holistic aspect of indigenous cultures and TK? As we have seen, while the human rights system is coming to terms with indigenous tangible and intangible cultures, the intellectual property system was not created to protect intangible knowledge and it is today struggling to accommodate indigenous cultural claims. To solve such problem, today indigenous peoples are unrealistically being asked to live by “the rules of customary laws and modern IP systems at the same time”⁸⁶ (when these are not

⁸⁴ Johanna Gibson *Community Resources* at 11.

⁸⁵ Kristen A Carpenter and others “In Defense of Property” (2009) 118 6 *The Yale Law Journal* 1022 at 1085.

⁸⁶ WIPO “Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge” (1998-1999) – Intellectual Property Needs and Expectations of Traditional Knowledge Holders (Genève, April 2001) at 57

in conflict; in that case IP regulations will most likely win over customary laws); but IP is not expected to abandon its monopolistic attire and rephrase its jargon to accommodate indigenous unique cultural practices.⁸⁷ It is often up to states to create ad hoc *sui generis* legislation for the safeguarding of indigenous cultures. This chapter has shown that human rights and intellectual property have come to terms with indigenous TK and are trying to accommodate indigenous holistic cultures although often unsuccessfully. The chapter has also shown how difficult it is today to address cultural property and why indigenous peoples are not often the owners of their knowledge and traditions and cannot therefore protect it from public interest. The next chapter will bring the theoretical discourse of this chapter to a practical level, reporting the detail of a New Zealand claim (Wai 262) that is today considered the most complete and comprehensive study existing on indigenous guardianship of tangible and intangible knowledge. New Zealand is, in fact, one of the countries which has tried, over recent years, to address indigenous claims and find workable solutions that would guarantee the safeguard and preservation of indigenous Māori traditions.

⁸⁷ In the words of Dutfield: "... if indigenous peoples in WTO member states are required to accept the existence of patents that they are economically prevented from availing themselves of and contracts that they cannot realistically enforce in the courts, why should their own knowledge-related customary regimes including property rules not be respected by others?" see Graham Dutfield *Protecting Traditional Knowledge: Pathways to The Future* (International Centre for Trade and Sustainable Development (ICTSD), Genève, 2006) at 38.

Chapter 7

Wai 262

This chapter focuses on a very important New Zealand case which, in twenty years, has analysed and discussed in great detail Māori culture and Māori people's needs and expectations. The case is particularly important because, for the first time, the role of the guardians of knowledge (kaitiaki) is thoroughly studied in all its complexity. It is also important because it shows the difficulties in accommodating indigenous claims in a national legal system that was not created to include Māori needs and expectations. At the same time, while the recommendations of the Waitangi Tribunal might not solve the problems that Māori communities still face today in Aotearoa/New Zealand, they are important factors of how states are trying to listen to indigenous voices and integrate their needs within their national legal systems. Wai 262 is also a very multifaceted analysis of the heritage and traditions of the Māori people of Aotearoa-New Zealand. Given the complexity and extensive material discussed in the case, the thesis will refer mostly to the studies that are closely related in importance to guardianship and sacred/secret intangible culture and their traditional expressions.

7.1 – Historical Background of the Claim

Wai 262 (which stands for Waitangi Tribunal case no 262 – “The Flora and Fauna and Cultural Intellectual Property Claim”) is probably one of the most complex cases involving indigenous peoples that was ever brought to a national tribunal. The claim tells the story of the peoples who centuries ago sailed from Hawaiki (which is the original home of Māori people but are unidentified Polynesian islands)¹ going West to the land of the ‘long cloud’ – Aotearoa. The Hawaikians

¹ “There is a considerable debate about when the first Polynesians arrived on the shores of Aotearoa, who they were, and where they came from. Many, but not all, tribes say Kupe was the first. In truth there were probably many Kupes from a number of the islands in eastern Polynesia. Tohunga (scholars) of the ao Māori – the traditional Māori world – also disagree about how many generations ago the first explorers arrived. They recite and debate the relevant whakapapa, weaving the tatai (genealogy) back and forth until the family lines come to resemble the structure of the DNA that they are designed to convey. Those who belong to the west coast tend to argue that the first explorer was Kupe, while those of the east coast tradition

imported in the new land unparalleled abundance, culture, science and system of knowledge. However, given the difference in climate and landscape, the old Hawaiki knowledge would soon struggle and adapt to the new environment thereby becoming Māori culture. Old technologies were adapted to the new ecosystem and new ones were created to better respond to the unique environment inhabiting Aotearoa.² Māori represent the indigenous peoples of New Zealand and as such they hold rangatiratanga³ rights to self-determination and an implicit margin of autonomy over land, identity and political voice that come with the right to self-determination.

The Wai 262 claim is also about Mātauranga Māori. As explained in the summary of the final report, Wai 262 is about “the relationship between the Mātauranga Māori of Kupe’s people and the Western world view of the second people who arrived 500 years after them”.⁴ In the Report’s own words, mātauranga is considered to derive from “mātau”, which means “to know”. Mātauranga can be literally translated as “knowing” or “knowledge”. But mātauranga “encompasses not only *what* is known but also *how* it is known – that is, the way of perceiving and understanding the world, and the values or systems of thought that underpin those perceptions”.⁵ In other words, mātauranga Māori refers to the

more often argue that it was Whatonga and his grandfather Toi Te Huatahi. Even within those traditions, one can discern some albeit fainter voices that maintain there were already Polynesians in residence when both Kupe and Whatonga arrived, irrespective of who was first. The anthropologists and archaeologists take a different view again. They say the arrival occurred somewhere between AD 800 and 1300, when people came from somewhere in eastern Polynesia – probably the Cook Islands or French Polynesia. These Polynesians had been resident in the Pacific for around 6,000 years, and had explored and ‘charted’ the Pacific’s vast expanse completely. Anthropologist Jared Diamond describes the Polynesian exploration of the Pacific as one humanity’s greatest feats. The long journey south to the temperate thirty-ninth parallel must surely have been the most challenging leg of all. The supreme difficulty of the voyage would have been mitigated only by the relative size of the target – at least compared to any other Polynesian land mass” see the Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (The Waitangi Tribunal, Wellington, 2011) at 2.

² “These changes reflected the migration from small islands to the new, larger ones in which land and forest had a much more powerful presence. Slowly, generation upon generation, as the people reacted to their new environment and the environment responded to its new residents, something distinctive began to take shape in the space between them. This we have come to know as ‘mātauranga Maori’ – the unique Maori way to see themselves and the world, which encompasses (among other things) Maori traditional knowledge and culture. Perhaps it was when the people and the environment reached a point of equilibrium that the former felt truly justified in calling themselves tangata whenua (people of the land) and their mātauranga could credibly be called Maori”; see the Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* at 6.

³ Stands for: chieftainship, self-determination, the right to exercise authority; imbued with expectations of right behaviour, appropriate priorities, and ethical decision-making.

⁴ See the Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* at 6.

⁵ See the Summary of the Report.

knowledge and to the way of knowing. It includes: language, whakapapa,⁶ technology, systems of law (customary laws), social control, systems of property and value exchange, forms of expression, traditional technology relating to food cultivation, storage, hunting and gathering, knowledge of plants and their uses, medicine, rituals, fibres and all the general properties of plants from their habitats, growth cycles and sensitivity to environmental change. It includes also carving, weaving, ta moko (facial and body tattooing), performing arts, ceremonial dances, waiata (song), whaikōrero (formal speech making) and karanga (ceremonial calling or chanting).⁷ Today Aotearoa–New Zealand is, in fact, a land that sits in between the traditions and heritages of the Pacific and the West. What is identified as biculturalism, is today an important aspect of New Zealand and its people's inherited values that still struggle to coexist dynamically.

Structurally, Wai 262 includes the claims of six individuals – Haana Murray, Hema Nui a Tawahaki Witana, John Hippolite, Tama Poata, Kataraina Rimene and Witi McMath on behalf of their iwi (Te Tanawa Ngati Kuri, Ngati Porou, Ngati Kahungunu and Ngati Wai), who addressed the Crown on the matter of who in Aotearoa – New Zealand owns and controls:

- mātauranga Māori (Māori world view, including traditional culture and knowledge);
- the tangible products of mātauranga Māori (eg traditional cultural and artistic expressions – taonga⁸ works); and
- the unique characteristics of indigenous flora and fauna of New Zealand (called taonga species).

The claim relates to the “tino rangatirantanga o te Iwi Māori in respect of indigenous flora and fauna *me o ratou taonga katoa* (and all their treasures) including but not limited to mātauranga, whakairo (carving, carved object; to

⁶ Stands for: genealogy, ancestral connections, lineage

⁷ See the Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* at 22.

⁸ It stands for: a treasured possession, including property, resources, and abstract concepts such as language, cultural knowledge, and relationships.

ornament with a pattern), waahi tapu (places sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense), biodiversity, genetics, Māori symbols and designs and their use and development and associated indigenous, cultural and customary heritage rights in relation to such taonga”.⁹ The claimants also stressed how they were “likely to be prejudicially affected by ordinances, Acts, regulations, Orders in Council, proclamations, notices and other statutory instruments, and the policies, practices, acts or omissions adopted by or proposed on behalf of the Crown and further as set out in this statement of claim” and ... they “are and remain inconsistent with the principles of Te Tiriti o Waitangi/Treaty of Waitangi”.¹⁰ Claimants argued that since the signing of the Treaty “there has been conduct or omission by or on behalf of the Crown that have prejudicially affected te tino rangatiratanga o te Iwi Māori in respect of indigenous flora and fauna”¹¹ which has been in breach of the Treaty of Waitangi (see next section). The omission of the Crown includes:

- the breaking down and/or active removal of Iwi political power structures as exercised through rangatiratanga, including in particular but not limited to

⁹ “‘Taonga’ in this claim refers to all elements of tribal groups’ estate, both material and non-material, tangible and intangible”, “Reference to ‘indigenous, cultural and customary heritage rights’ in this claim is deemed to include all rights (including intellectual and property rights) past, present and future in relation to tanga o te Iwi Māori” see the First Amended Statement of the Claim, The Waitangi Tribunal, WAI 262, SOI 1.1(a) at para 2.1.

¹⁰ “The Treaty of Waitangi is New Zealand’s founding document. It takes its name from the place in the Bay of Islands where it was first signed, on 6 February 1840. This day is now a public holiday in New Zealand. The Treaty is an agreement, in Māori and English, that was made between the British Crown and about 540 Māori rangatira (chiefs). Growing numbers of British migrants arrived in New Zealand in the late 1830s, and there were plans for extensive settlement. Around this time there were large-scale land transactions with Māori, unruly behaviour by some settlers and signs that the French were interested in annexing New Zealand. The British government was initially unwilling to act, but it eventually realised that annexing the country could protect Māori, regulate British subjects and secure commercial interests. Lieutenant-Governor William Hobson had the task of securing British sovereignty over New Zealand. He relied on the advice and support of, among others, James Busby, the British Resident in New Zealand. The Treaty was prepared in just a few days. Missionary Henry Williams and his son Edward translated the English draft into Māori overnight on 4 February. About 500 Māori debated the document for a day and a night before it was signed on 6 February. Hobson and others stressed the Treaty’s benefits while playing down the effects of British sovereignty on rangatiratanga (chiefly authority). Reassured that their status would be strengthened, many chiefs supported the agreement. About 40 chiefs, starting with Hōne Heke, signed the Māori version of the Treaty on 6 February. By September, another 500 had signed the copies of the document that were sent around the country. Some signed while remaining uncertain; others refused or had no chance to sign. Almost all signed the Māori text. The Colonial Office in England later declared that the Treaty applied to Māori tribes whose chiefs had not signed. British sovereignty over the country was proclaimed on 21 May 1840” electronic document <www.nzhistory.net.nz/politics/treaty/the-treaty-in-brief> last visited on 20/06/15; See also the First Amended Statement of the Claim, The Waitangi Tribunal, WAI 262, SOI 1.1(a) at para 2.10 and 2.11.

¹¹ Supra at para 4.1.

the removal manaakitanga,¹² kaitiakitanga¹³ and tapu of te Iwi Māori in respect of indigenous flora and fauna me o ratou tanga katoa; under the following Acts of Parliament:

1. The Tohunga Suppression Act 1909
2. The Native Plants Protection Act 1934
3. The Reserves Act
4. The Wildlife Act

- the loss to Māori of cultural, spiritual and medicinal knowledge and concepts found in indigenous flora and fauna ... as a result of these breaches;
- the loss and alienation from Māori of ecosystems of these flora and fauna including their lands and waters;
- the creation of 'reserves' by the Crown for the 'protection' of species of flora and fauna often in direct denial of te tino rangatiratanga ... over the land concerned;
- the gazetting and establishment of 'protected species' by the Crown in denial of the concept of kaitiakitanga which is implicit in rangatiratanga;
- the delegation by the Crown of regulatory powers over native species ...
- the selling, disposal, and export of species of indigenous flora and fauna and /or their genes representing the genetic resources of Aotearoa by the Crown and its agents or by other parties encouraged/permitted/sanctioned by actions or omissions of the Crown in a manner contrary to the Treaty of Waitangi;
- the social and economic policies of successive governments that have made it impossible for Māori to exercise effective rangatiratanga and appropriate kaitiakitanga in relation to indigenous flora and fauna; and
- the extension and exercise of kawanatanga (government, governorship, authority) over indigenous flora and fauna in a manner which is inconsistent with the principles of the Treaty.¹⁴

¹² It translates as: hospitality, kindness, generosity, support - the process of showing respect, generosity and care for others.

¹³ It translates as: the obligation to nurture and care for the mauri of a taonga; ethic of guardianship, protection.

¹⁴ See the First Amended Statement of the Claim, The Waitangi Tribunal, WAI 262, SOI 1.1(a) at para 4.

The claimants also argued that “the denial of te tino rangatiratanga removed the effective ability of Iwi to give expression to, and practice, the cultural and spiritual values associated with the indigenous flora and fauna ...”.¹⁵ Such denial also removed any Iwi’s effective ability to develop and have access to changing technologies “in the propagation and utilisation of indigenous flora within their rohe, and to determine the indigenous cultural and customary heritage rights of such species ...”.¹⁶ On the same line, the claimants argued that with the signing of the GATT:TRIPS Agreement¹⁷ the government of New Zealand has substantially prejudiced “the guarantee to Māori under the Treaty to their indigenous flora and fauna”.¹⁸ Claimants, in fact, stressed that “the GATT:TRIPS Agreement places greater emphasis on the economic values of intellectual property at the expense of other values important to indigenous peoples such as communal knowledge systems and the cultural and spiritual relationship that indigenous peoples have with their natural environments” (para 14.6). According to the claimants, not only has the signing of the TRIPS Agreement brought great harm to the traditional knowledge and practices of Māori people of Aotearoa-New Zealand, but that any international laws, conventions and legal instruments that have been ratified after 1840 and are “morally and legally binding” (para 14.8) on the New Zealand Government are inconsistent with the Crown’s obligations to Māori under the Treaty and are consequently in breach of the Treaty. The claims also question the nature of the partnership between Māori interests and the Crown, and where the power and control in the partnership de

¹⁵ At para 5.2.

¹⁶ At para 5.3.

¹⁷ GATT - General Agreement on Tariffs and Trade (GATT), set of multilateral trade agreements aimed at the abolition of quotas and the reduction of tariff duties among the contracting nations. When GATT was concluded by 23 countries at Geneva, in 1947 (to take effect on Jan. 1, 1948), it was considered an interim arrangement pending the formation of a United Nations agency to supersede it. When such an agency failed to emerge, GATT was amplified and further enlarged at several succeeding negotiations. It subsequently proved to be the most effective instrument of world trade liberalization, playing a major role in the massive expansion of world trade in the second half of the 20th century. By the time GATT was replaced by the World Trade Organization (WTO) in 1995, 125 nations were signatories to its agreements, which had become a code of conduct governing 90 percent of world trade. The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh (Morocco, 1994)

¹⁸ At para 14.3. Moreover, according to the claimants, “the GATT:TRIPS Agreement establishes and international uniform and universally applicable intellectual property standard. The effect of these standards is to allow the international commodification of indigenous flora and fauna *me o ratou taonga katoa* without reference to Māori as the original owners of these taonga (para 14.5)”. The GATT:TRIPS Agreement places greater emphasis on the economic values of intellectual property at the expense of other values important to indigenous peoples such as communal knowledge systems and the cultural and spiritual relationship that indigenous peoples have with their natural environments.

facto lies. The question is essentially simple and yet incredibly complicated: can the right of the Crown democratically co-exist with Māori control of their taonga in their traditional way? Can the rights expressed in both versions of the Treaty coexist and be equally guaranteed? These fundamental questions will now be examined within the confines of the Wai 262.

7.2 – The Treaty of Waitangi and the Waitangi Tribunal

The most important promises of the Treaty of Waitangi which are relevant to Wai 262 was the guarantee that tino rangatiratanga of iwi and hapu over the ‘taonga katoa’ would be protected. This means that the highest chieftainship over Māori treasured things would be inter alia guaranteed. However, as Claudia Orange has stated, the Treaty brought more confusion than clarification to the real intentions of its ratifications by rangatira since its creation in 1840. The English version of the Treaty, in fact, ceded to Britain the sovereignty of New Zealand and gave the Crown “an exclusive right of pre-emption as the Māori people wished to sell”,¹⁹ while Māori people were given full rights of ownership of their lands, forests, fisheries and taonga treasures. Māori people were also promised the rights and privileges of British subjects and the assurance that the Crown would protect Māori tribes from the invasion of other colonial powers.²⁰ However apparently fair, the intention of the British government was evident to the English representatives: the Crown required a “cession of sovereignty, absolute control over all land matters and authority to impose law and order on both Māori and non-Māori”.²¹ According to Orange, the difficulties of interpretation and intentionality surrounded the Treaty from its early years, and most of them have not been settled yet. In her book *–The Treaty of Waitangi–* she presents several key questions that continue to receive contradicting answers: What rights did the Treaty confer or confirm? What responsibilities did it imply for both contracting parties? Did it apply to all Māori or only to the tribal

¹⁹ Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Port Nicholson Press, Wellington, 1987) at 1.

²⁰ “The third article, conferring Crown protection and the status of British subjects on Māori [...] served a dual purpose: its placed the Māori under British law, and at the same time extended could be construed a privileges of some significance for an indigenous race” see Claudia Orange *The Treaty of Waitangi* at 86.

²¹ Supra at 36.

groups committed by their chief's agreement? Unfortunately, the Treaty was never able to settle these disputes. Much of the confusion and contradictions came from the bilingual format in which the Treaty was created.²²

Historically, the Treaty of Waitangi²³ is an example of how settlers used (intentionally or not)²⁴ the difference in language to convince Māori peoples of the good intentions of the Crown and legalize the intentional acquisition of sovereignty over the land they traditionally occupied. Due to problems in translation or misrepresentation that shielded key differences in the two versions, what Māori chiefs signed in the Māori version, did not reflect its English equivalent (and, according to Orange, there is reason to believe that the British representatives in loco were aware of such substantial differences in the texts).²⁵ In fact, Māori peoples signed a text that was subtly and yet significantly different in the English version both in concept and intention. In the Māori version the description of collective and individual ownership was altogether omitted as well as the idea of possession expressed by the concept of *te tino rangatiratanga* (a chief's *mana* is his *rangatiratanga*). In the Māori language, in fact, *tino rangatiratanga* means more than the word "possession" used in the English version.²⁶ The Māori version alternates *tino rangatiratanga* with *kawanatanga*. The first encompassing the Māori concept of chieftainship and the second

²² Though, the bilingual version of the Treaty also represents its strength because most of the Europeans-indigenous treaties were written in English (or French) with the indigenous oral version disputed.

²³ "On 6 February 1840, the Treaty of Waitangi was signed at Waitangi in the Bay of Islands by Hobson, several English residents, and approximately 45 Māori rangatira, Hone Heke being the first. The Māori text of the Treaty was then taken around Northland to obtain additional Māori signatures and copies were sent around the rest of the country for signing, but the English text was signed only at Waikato Heads and at Manukau by 39 rangatira. By the end of that year, over 500 Māori had signed the Treaty. Of those 500, 13 were women" electronic document <www.waitangi-tribunal.govt.nz/treaty/> last visited on 15/07/2015.

²⁴ "According to Hugh Carleton, William's son-in-law and biographer, Williams made the translation with 'the assistance of his son Edward ... While the twenty-one-year-old Edward probably had the facility with spoken Māori that someone might expect from someone who has spent most of his youth in New Zealand, he was not an experienced translator. Nor was Henry Williams an acknowledged expert in the field [...]' and there is no evidence of Māori assistance" see Claudia Orange *The Treaty of Waitangi* at 39; "The English version guaranteed 'undisturbed possession' of all their 'properties', but the Māori version guaranteed 'tino rangatiratanga' (full authority) over 'taonga' (treasures, which may be intangible). It is known that Māori chiefs would not have signed the Treaty if it was clearly specified that it included ceding all sovereignty and self-government" see the history of the Treaty of Waitangi at <www.nzhistory.net.nz/politics/treaty-of-waitangi> last visited on 11/12/2015.

²⁵ "Hobson sent his superiors several English copies, each with slight variations. On one copy, Williams appended a certification that the English text was 'as literal translation of the Treaty of Waitangi as the idiom of the language will admit of'. This was not so. There was no translation of the Māori text, nor was the Māori text an accurate translation of any one of the English versions" see Claudia Orange at 85.

²⁶ At 40-41.

relating mostly to the British concept of governorship.²⁷ It is therefore unsurprising that Māori were unaware that the substitution for *kawanatanga* would, in the English version, grant total annexation and sovereignty of Māori territories that would “bring international recognition of New Zealand as a British colony”.²⁸ The celebrations that followed the signing of the Treaty, in fact, were in “honour of the new British Colony of New Zealand”.²⁹ In both versions, the text did not introduce the idea of annexation that the British had in mind. The Māori version of the Treaty was also silent on the fact that the Crown was *de facto* securing the “exclusive control over all transaction in Māori lands”.³⁰ In other words, Māori people could only sell their lands for ridiculous prices to the Crown that now had a monopoly to resell them with huge profits.³¹ Although by 1840 Māori people had already been selling land to settlers for over 25 years, they did not have ‘legal’ knowledge of the British common law of property and were not aware that there would be a difference between national sovereignty and proprietary land rights. What the creator of the Treaty stressed instead was the idea of Aotearoa becoming part of the British family where the Queen, like a mother, would look after and protect Māori people as British citizens. At the time, Māori people were, in fact, more concerned about the internal fights among tribes and the external threat of France that was landing on their shores with increasing frequency. It is not surprising therefore if Māori decided to seek the protection of the Crown (which already controlled Australia) with whom they had had a longstanding trade relationship. The treaty would guarantee a *Pax Britannica* among the numerous conflicts between Māori and Europeans and, at the same time, discourage the conquest of other colonial powers.³² On the other hand, only with Māori cooperation, could Britain hope to keep at bay all the foreign challenges. In this case, only a sovereignty that was voluntarily ceded could maintain a pacific presence of British citizens on New Zealand soil. In the

²⁷ “The representative of the British Crown in a colony or in a Commonwealth state that regards the monarch as head of state” at <www.oxforddictionaries.com/definition/english/governor> last visited on 20/06/2015.

²⁸ See Orange at 46.

²⁹ At 55.

³⁰ At 42.

³¹ “The British government wanted to have complete control over all land transactions. Because this could only be achieved with Māori agreement, the treaty’s second article including pre-emption was as vital to government interests as the land guarantee was to Māori interests” see Claudia Orange at 86

³² See Orange at 67

Preamble to the English version it is stated that the British intentions were to “protect Māori interests from the encroaching British settlement, provide for British settlement and establish a government to maintain peace and order”.³³

While the Māori text has a different emphasis. It suggests that “the Queen's main promises to Māori were to provide a government while securing tribal rangatiratanga (chiefly autonomy or authority over their own area) and Māori land ownership for as long as they wished to retain it”.³⁴ The translation of the articles that Māori signed is:

Article 1 - The chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

Article 2 - The Queen of England agrees to protect the chiefs, the sub tribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

Article 3 - For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.³⁵

³³ See the History of the Treaty of Waitangi at <www.nzhistory.net.nz/politics/treaty/read-the-Treaty/differences-between-the-texts> last visited on 12/12/2015.

³⁴ Supra.

³⁵ “In the Māori text of article 1, Māori gave the British a right of governance, *kawanatanga*, whereas in the English text, Maori ceded ‘sovereignty’. One of the problems that faced the original translators of the English draft of the Treaty was that ‘sovereignty’ in the British understanding of the word had no direct translation in the context of Māori society. Rangatira (chiefs) held the autonomy and authority, ‘rangatiratanga’, over their own domains but there was no supreme ruler of the whole country. In the Māori version, the translators used the inadequate term ‘kawanatanga’, a transliteration of the word ‘governance’, which was then in current use. Māori understanding of this word came from familiar use in the New Testament of the Bible when referring to the likes of Pontious Pilate, and from their knowledge of the role of the ‘Kawana’, or Governor of New South Wales, whose jurisdiction then extended to British subjects in New Zealand. As a result, in this article, Māori believe they ceded to the Queen a right of governance in return for the promise of protection, while retaining the authority they always had to manage their own affairs. The Māori version of article 2 uses the word ‘rangatiratanga’ in promising to uphold the authority that tribes had always had over their lands and taonga. This choice of wording emphasises status and authority. In the English text, the Queen guaranteed to Māori the undisturbed possession of their properties, including their lands, forests, and fisheries, for as long as they wished to retain them. This text emphasises property and ownership rights. Article 2 provides for land sales to be effected through the Crown. This gave the Crown the right of pre-emption in land sales. The Waitangi Tribunal, after reading the instructions for the Treaty provided by Lord Normanby, concluded that the

While the English version is:

Article 1 - The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

Article 2 - Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Pre-emption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article 3 - In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

The fundamental difference is that, according to the Māori version (translated by Missionary Henry Williams' son Edward, *supra* footnote 9), Māori chiefs were retaining total sovereignty over their land and their Mātauranga mo nga Tikanga (traditional rules for conducting life, custom, method, rule, law),³⁶ while in the English version such sovereignty could be pre-emptively taken away by the

purpose of this provision was not just to regulate settlement but to ensure that each tribe retained sufficient land for its own purposes and needs" see The Waitangi Tribunal at <www.waitangi-tribunal.govt.nz/treaty/meaning.asp> last visited on 06/06/2012.

³⁶ "... pursuant to Article 2 of the Treaty of Waitangi, they (Maori chiefs) were guaranteed tino rangatiratanga over, and full exclusive and undisturbed possession of, all taonga, including indigenous flora and fauna within their rohe, recognition and protection of Ngati Kahungunu cultural knowledge, and Ngati Kahungunu rongoa. This guarantee included the right and obligations of Ngati Kahungunu to fulfil their kaitiaki (guardianship) responsibilities in regard to this taonga" see Wai 262 Statement of Issues 2.314 (6 July 2006) at 30.

Queen and her in loco representatives. Another difference is the use of the words 'citizens' in the Māori version and 'subjects'³⁷ in the English one. Until the 1981 Nationality Act, the people who under British law were considered 'subjects' were, in fact, not entitled to the same rights given to British citizens. As British subjects, however, Māori people could not be pre-emptively dispossessed of their traditional land as confirmed in the Māori version of Art 3.³⁸ Another difference is that, between the English and the newly translated version of the Treaty, no intention was ever manifested by the Crown to mend the mistake or to genuinely consider the Māori version instead of the English one, following through the recognition of landownership of Māori people in Aotearoa. Since its creation, the valid version of the Treaty was implicitly assumed to be the English one, regardless of what Māori people thought they had signed or understood. On a different note, years later, the Crown responded to the Māori allegations explaining that the Treaty was never intended to become a binding instrument, so the language used was inconsequential. However, in the words of Joseph Phillimore Esq³⁹ the Treaty of Waitangi is "of binding obligation on the two contracting parties, and that it is to be considered as the corner stone, on which all our relations, with the Islands of New Zealand, must be founded".⁴⁰ Having said this, the legal status of the Treaty back in 1840 is still not clear. Clearly, the main intent of the Treaty, from the English perspective, was to establish a new

³⁷ "Within the British Empire, the main class of people who were not British subjects were the rulers of native states formally under the protection of the British Crown, and their peoples. Although their countries may for all practical purposes have been ruled by the imperial government, such persons are considered to have been born outside the sovereignty and allegiance of the British Crown, and were (and, where these persons are still alive, still are) known as British protected persons" see at <http://en.wikipedia.org/wiki/British_subject>; "Until 1949, nearly everyone with a close connection to the United Kingdom was called a British subject. And all citizens of Commonwealth countries were British subjects until January 1983. Since that date, very few categories of people have qualified as British subjects" <<http://ukba.homeoffice.gov.uk/britishcitizenship/othernationality/britishsubjects/>> last visited on 06/06/2012.

³⁸ See electronic document

<<http://ukba.homeoffice.gov.uk/britishcitizenship/othernationality/britishsubjects/>> last visited on 06/06/2012.

³⁹ "Joseph Phillimore was a well-known lawyer, an MP and, at one time, regius professor of civil law at Oxford University. Phillimore's liberal national politics and international legal expertise made him an appropriate and authoritative source for the APS. That is, the *Dictionary of National Biography* notes that "during his parliamentary career he distinguished himself by his able advocacy of catholic emancipation and his luminous expositions of international law". His son, Sir Robert Joseph Phillimore, was a distinguished jurist and scholar and wrote a famous, four-volume *Commentaries on International Law* (1854-61) see *Dictionary of National Biography*, 1070-1074.

⁴⁰ Quoted in Claudia Orange *The Treaty of Waitangi* at 130.

British sovereign by a valid ‘treaty of cession’.⁴¹ During the negotiations of the Treaty, Māori people were repeatedly told that they had “given the Queen the ‘hokonga’ (selling) only, and that in the Māori text of the Treaty this did not constitute a cession of the ‘sole and exclusive right of purchase’”.⁴² How could the cession of native lands be legal if the signatories to the Treaty were not aware they were actually giving away their own sovereignty? What legal value has the fact that Māori chiefs did actually sign the Māori version of the Treaty with its substantial conceptual and legal differences and the implications that arise?

According to the Vienna Convention on the Law of Treaties (1969): “When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail”.⁴³ This means that, regardless of the intentions of the parties at the time of the ratification, today both versions of the Treaty of Waitangi should be considered effective unless both parties agree otherwise. Which brings us to believe that the assumption of the Crown that the Treaty is just a piece of paper with no legal standing or authority can be considered inconsistent with international law; especially in the light of the fact that much of the Vienna Convention on the Law of Treaties today forms customary international law⁴⁴ and New Zealand signed the Convention in

⁴¹ See Orange at 87.

⁴² See Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand electronic document <<http://nzetc.victoria.ac.nz/tei-source/TurEpit.xml>> last visited on 29/05/2015.

⁴³ Vienna Convention on the Law of Treaties 1969, Article 33.3 states that: “The terms of the treaty are presumed to have the same meaning in each authentic text”, while Article 33.4 affirms that: “Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.

⁴⁴ “In short, the law of treaties is not itself dependent on treaty, but is part of general customary international law. Queries might arise if the law of treaties were embodied in a multilateral convention, but some States did not become parties to the convention, or became parties to it and then subsequently denounced it; for they would in fact be or remain bound by the provisions of the treaty in so far as these embodied customary international law *de lege lata*. No doubt this difficulty arises whenever a convention embodies rules of customary international law. In practice, this often does not matter. In the case of the law of treaties it might matter — for the law of treaties is itself the basis of the force and effect of all treaties. It follows from all this that if it were ever decided to cast the Code, or any part of it, in the form of an international convention, considerable drafting changes, and possibly the omission of some material, would almost certainly be required” eleventh session to the General Assembly (1959), see International Law Commission electronic document <http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTSOnline&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en> last visited on 14/06/2012

1970 and ratified it in 1971.⁴⁵ It is true that the Vienna Convention does not extend to national treaties, however, the parties that entered the treaty were de facto two nations: the British and the Māori nations.⁴⁶

In 1975 the Treaty of Waitangi Act set up the Waitangi Tribunal. The Tribunal is “a permanent commission of inquiry charged with making recommendations on claims brought by Māori relating to actions or omissions of the Crown that potentially breach the promises made in the Treaty of Waitangi”.⁴⁷ If a claim meets the requirements set down by the Tribunal, it is given a number and proceed to the hearings.⁴⁸ Normally the claims brought to the Tribunal are complaints that the Crown has breached the Treaty of Waitangi “by particular actions, inactions, laws, or policies and that Māori have suffered prejudice (harmful effects) as a result”.⁴⁹ The recommendations are not legally binding for

⁴⁵ Supra.

⁴⁶ “The Vienna Convention on the Law of Treaties of 1969 (VCLT) is the main instrument that regulates treaties. It defines a treaty and relates to how treaties are made, amended, interpreted, how they operate and are terminated. It does not aim to create specific substantive rights or obligations for parties – this is left to the specific treaty (i.e. the Vienna Convention on Diplomatic Relations creates rights and obligations for States in their diplomatic relations). VCLT governs treaties irrespective of its subject matter or objectives – eg: treaties to regulate conduct of hostilities (Geneva Conventions on 1949); treaties setting up an international organisation (UN Charter of 1945); and treaties regulating matters between States and other parties on the law of the sea (UN Convention on the Law of the Sea of 1982). The VCLT relates only to treaties concluded between States who are parties to the VCLT, and for treaties that entered into force after the VCLT came into force (The VCLT came into force in 1980. See Article 4 of the VCLT). NB: this does not prevent a provision of the VCLT that reflects customary international law from applying to a treaty even if it does not meet the above requirements. In the *Kasikili/Sedudu Island Case* the ICJ held that Article 31 of the VCLT on treaty interpretations reflected customary international law and that therefore applied despite the fact that both Botswana and Namibia were not parties to the VCLT and the treaty in question entered into force in 1890” see electronic document <<https://ruwanthikagunaratne.wordpress.com/2013/05/26/law-of-treaties-vienna-convention-on-law-of-treaties-1969/>> last visited on 20/06/2015.

⁴⁷ See the Waitangi Tribunal at <www.justice.govt.nz/tribunals/waitangi-tribunal> last visited on 01/07/2015.

⁴⁸ “Any Māori person may submit a claim to the Waitangi Tribunal. (For this purpose, a ‘Māori person’ includes someone who is descended from a Māori.) A claim may be submitted on behalf of a group of Māori, including an organisation such as a *rūnanga*, but an organisation may not be a claimant on its own. The Waitangi Tribunal may inquire only into certain matters. Section 6 of the Treaty of Waitangi Act 1975 sets out the grounds for making a claim. First, a claim must relate to one or more of the following matters: an Act of Parliament, an ordinance, a regulation, or another statutory instrument; a practice or policy adopted or proposed by or on behalf of the Crown; an action or omission by or on behalf of the Crown, or proposed by or on behalf of the Crown. Secondly, the claimant must demonstrate how the law, or the practice, policy, action, or omission of the Crown: is or was inconsistent with the principles of the Treaty of Waitangi; and has prejudicially affected the claimant, or the group on whose behalf the claim is made. Claims may relate to Treaty breaches dating back to 6 February 1840, when the Treaty was signed” see The Waitangi Tribunal at <www.justice.govt.nz/tribunals/waitangi-tribunal/the-claims-process/making-a-claim> last visited on 12/12/2015.

⁴⁹ “Claims need to be comprehensive - that is, cover all the matters at issue between the claimants and the Crown - and they need to be proven - that is, supported by evidence of a standard that the Tribunal will find convincing. The Crown has an opportunity to challenge evidence by cross-examining witnesses, and to submit evidence of its own. When receiving historical evidence, the Tribunal requires reports from professional historians. When receiving traditional evidence, the Tribunal requires reports based at least partly on oral interviews with claimants, and it requires oral evidence from claimants at hearings. These and

the Government of New Zealand, however, often it implements the recommendations to a certain degree. The only binding recommendation that the Tribunal can make is an interim recommendation for the first 90 days.⁵⁰ The Tribunal is the key instrument to “examine any claim by a Māori or group of Māori who may have been prejudiced by laws and regulations or by acts, omissions, policies, or practices of the Crown since 1840 that are inconsistent with the principles of the Treaty of Waitangi”.⁵¹ Frequently, such inconsistency includes the failure to protect kaitiakitanga. As stressed on several occasions by the Waitangi Tribunal,⁵² the sovereignty of the Crown at the time of ratification “was intended to be qualified by the Crown obligation to actively protect Māori

other types of evidence are all important in a Tribunal inquiry” at <www.justice.govt.nz/tribunals/waitangi-tribunal> last visited on 01/07/2015.

⁵⁰ “This period is intended to allow the Crown and the claimants to reach a negotiated settlement in place of, or incorporating aspects of, the Tribunal's binding recommendation. If a settlement is reached in the 90-day period, the Tribunal amends its recommendation to give effect to the terms of the settlement. If no settlement is reached in that period, the interim binding recommendation takes full effect and must be implemented by the Crown” at <www.justice.govt.nz/tribunals/waitangi-tribunal/about/frequently-asked-questions> last visited on 01/07/2015.

⁵¹ See at <www.justice.govt.nz/tribunals/waitangi-tribunal/about/frequently-asked-questions> last visited on 01/07/2015.

⁵² “The Waitangi Tribunal was set up in 1975 at a time when protests about unresolved Treaty grievances were growing and, in some instances, taking place outside the law. By establishing the Tribunal, Parliament provided a legal process by which Māori Treaty claims could be investigated. The Waitangi Tribunal inquiry process contributes to the resolution of Treaty claims and, in that way, to the reconciliation of outstanding issues between Māori and Pākehā. The Waitangi Tribunal was established by an Act of Parliament, the Treaty of Waitangi Act 1975. While that Act is the main statute governing the Tribunal, there are other statutes that regulate or affect how it works, including the Commissions of Inquiry Act 1908, the Treaty of Waitangi (State Enterprises) Act 1988, and the various statutes that give effect to Treaty claim settlements. The Waitangi Tribunal is part of New Zealand's judicial system, which comprises a range of bodies, including: the general courts (including the District Court, the High Court, and the Court of Appeal); a number of specialist courts (including the Māori Land Court, the Family Court, and the Environment Court); various tribunals (including the Disputes Tribunal and the Residential Tenancies Tribunal); and temporary commissions of inquiry, royal commissions of inquiry, and so forth, which are established to inquire into specific matters. The Waitangi Tribunal is unusual in that it was established as a permanent commission of inquiry. For this reason, it differs from a court in several important respects: Generally, the Tribunal has authority only to make recommendations. In certain limited situations, the Tribunal does have binding powers, but in most instances, its recommendations do not bind the Crown, the claimants, or any others participating in its inquiries. In contrast, courts can make rulings that bind the parties to whom they relate. The Tribunal's process is more inquisitorial and less adversarial than that followed in the courts. In particular, it can conduct its own research so as to try to find the truth of a matter. Generally, a court must decide a matter solely on the evidence and legal arguments that the parties present to it. The Tribunal's process is flexible – the Tribunal is not necessarily required to follow the rules of evidence that generally apply in the courts, and it may adapt its procedures as it thinks fit. For example, the Tribunal may follow 'te kawa o te marae'. In contrast, the procedure in courts is much less flexible, and there are normally strict rules of evidence to be followed. The Tribunal does not have final authority to decide points of law. That power rests with the courts. However, for the purposes of the Treaty of Waitangi Act 1975, the Tribunal has exclusive authority to determine the meaning and effect of the Treaty as it is embodied in both Māori and English texts. The Tribunal has a limited power to summons witnesses, require the production of documents, and maintain order at its hearings. But it does not have a general power to make orders preventing something from happening or compelling something to happen. Nor can it make a party to Tribunal proceedings pay costs” at <www.waitangi-tribunal.govt.nz/about/established.asp> last visited on 18/02/2013.

rangatiratanga”⁵³ and, consequently, kaitiakitanga. In the human realm, those who have mana (or to use Treaty terminology, rangatiratanga) must exercise it in accordance with the values of kaitiakitanga. In fact, tino rangatiratanga includes the rights of kaitiaki to protect taonga works and species and to make and enforce laws and customs in relation to them.

7.3 - Tino Rangatiratanga – An All-Encompassing Concept

According to the statement of claim,⁵⁴ tino rangatiratanga o te Iwi Māori is:

... the authority residing within and exercised by te Iwi Māori o Aotearoa me te Waipounamu/Rekohu prior to the arrival of the colonial government which included but is not limited to the full and exclusive rights and responsibilities of manaakitanga, kaitiakitanga and tapu and the development of these rights. Te tino rangatiratanga o te Iwi Māori incorporates a right of development which permits the Iwi to conserve, utilise and exercise rights over indigenous flora and fauna *me o ratou taonga katoa*.

According to the Report on Wai 262, tino rangatiratanga incorporates:

- decision-making authority over the conservation, control of, and proprietary interests in natural resources including indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 2.5(a));
- the right to determine indigenous cultural and customary heritage rights in the knowledge and use of indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 2.5(b));
- the right to protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna (Claim 1.1(a) para 2.5(e));
- a right to environmental well-being dependent upon the nurturing and wise use of indigenous flora and fauna (Claim 1.1(a) para 2.5(f));

⁵³ Waitangi Tribunal *The Ngai Tahu Report* at 237.

⁵⁴ See the First Amended Statement of the Claim, The Waitangi Tribunal, WAI 262, SOI 1.1(a) at para 2.3, 2.4.

- the right to participate in, benefit from and make decisions about the application, development, uses and sale of me o ratou taonga katoa⁵⁵ (Claim 1.1(a) para 2.5(g)); and
- the rights to protect, enhance and transmit the cultural and spiritual knowledge and concepts found in me o ratou taonga katoa (Claim 1.1(a) para 2.5(h)).

In general, tino rangatiratanga traditionally provides the basis for Māori self-determination and autonomy by securing control over resource use and decision making as implicitly inherent in the right to self-determination. The word rangatiratanga derives from 'rangatira' which denotes the paramount authority of the chief within Māori societies. Tino brings emphasis to an already powerful concept. According to Orange, tino rangatiratanga was used for the first time in the 1835 Declaration of Independence by Māori chiefs and in 1840 was consequently recognised by Britain during the negotiations and signing of the Treaty of Waitangi. Maaka and Fleras argue that until the nineteenth century tino rangatiratanga was mostly used by the missionaries to convey among Māori the biblical concept of 'kingdom'.⁵⁶ However, its importance grew after its iconographic meaning was incorporated in the Treaty of Waitangi. From then on the words started encompassing the concept of "Māori sovereignty, Māori nation, iwi nationhood, independent power, full chiefly authority, chiefly mana, strong leadership, independence, supreme rule, self-reliance, Māori autonomy, tribal autonomy, absolute chieftainship, self-management and trusteeship".⁵⁷ Today tino rangatiratanga is considered as best represented by the indigenous peoples' right to self-determination and the right to autonomy that comes with it. As Maaka and Fleras explain, "tino rangatiratanga constitutes a collective and inherent authority that justifies Māori claims to Māori models of self-

⁵⁵ "Me o ratou taonga katoa includes buti t is not limited to whakairo, rongoa Māori, wahi tapu, pa sites and Māori cultural images, designs and symbols and associated indigenous, cultural and customary heritage rights in relation to such taonga" see the First Amended Statement of the Claim, The Waitangi Tribunal, WAI 262, SOI 1.1(a) at para 2.9.

⁵⁶ See Roger Maaka and Augie Fleras *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (University of Otago Press, Dunedin, 2005) at 101.

⁵⁷ "Depending on the criteria or context, tino rangatiratanga could be applied to justify initiatives as varied as Māori empowerment, absolute ownership and control within a Māori idiom, biculturalism and partnership, Māori control over Māori things within a Māori value system, restoration of Māori mana, self-sufficiency at individual and group levels, and Māori cultural autonomy and territorial development" supra at 102.

determination autonomy over culture and identity, development of land and resources, improvement of Māori lives and life-chances, and a commitment to autonomy in partnership with the Crown”.⁵⁸ In other words, the asserted absolute authority of the Crown is not so absolute, especially in case the rights guaranteed to Māori people by the Treaty of Waitangi would make them constitutional partners in the joint sovereignty over Aotearoa-New Zealand. As international law has recently expressed with the creation of the Declaration on the Right of Indigenous Peoples (Art 3 and 4),⁵⁹ indigenous peoples’ right to self-determination is an inherent right they possess, which gives them the autonomy and authority to own, possess, protect and manage their culture and traditions without formal interference by the state.⁶⁰ Although tino rangatiratanga is a term that originated in New Zealand, the logic behind it is commonly shared by the indigenous peoples of the world and includes all those entitlements and rights that inherently come with the principle of original occupancy and native title and everything that it includes. Indeed, it includes the idea that things and places cannot be owned or possessed as in the Western idea of exclusive and undisturbed possession. Māori people, like most of the indigenous traditions of the world, consider themselves the guardians of the land and of all the things that surround them. The substantial difference is between the concept of ownership versus that of kaitiakitanga (see chapter 4).

The statement of claim asserts that the Treaty of Waitangi “reaffirms, preserves and guarantees the continuing authority of te tino rangatiratanga o te iwi Māori

⁵⁸ At 102.

⁵⁹ UNDRIP, Art 3 – “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”; Art 4 – “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”.

⁶⁰ Several international instruments include provisions that recognise the rights of indigenous peoples:

- Agenda 21 of the United Nations Conference on Environment and Development (Brazil, 1992) recognises indigenous peoples’ right to development and to respect and safeguard their traditional knowledge and practices;
- Universal Declaration on Human Rights – Art 17;
- International Convention on Civil and Political Rights – Common Art 1 recognises the right of people to claim the right to self-determination (NZ is signatory);
- Convention on Biological Diversity – Article 8(j);
- UN DRIP;
- Mataatua Declaration – Preamble and clause 2.1, 2.7, 2.3; and
- The Treaty for Life Forms Patent (1995).

in and over indigenous flora and fauna”⁶¹ and as a consequence the Crown has a continuing obligation to ‘take active and positive steps’ to assist Māori people in the preservation of te tino rangatiratanga o te Iwi Māori in respect of their taonga.⁶² According to the Report, the two categories of taonga give rise to different Treaty obligations and interests: first of all, as in the case of most of indigenous peoples’ cultural heritage all over the world, taonga were wrongly and unlawfully taken away from Māori people or recently rediscovered locked down in museums or institutions; in both cases, iwi maintain “a rangatiratanga interest in them, for the items were never willingly alienated”.⁶³ The second case involves all the taonga that were “willingly sold or gifted by Māori”.⁶⁴ In this case too much on-going cultural and spiritual relationship between iwi and taonga persists and consequently also Treaty interests remain in place; although there is no expectation attached to have them returned as in the case of taonga unlawfully taken away. Following the rights and obligations inscribed in the Treaty, kaitiaki are still entitled to ‘exercise’ their relationship with the taonga willingly sold or gifted. In the case of the taonga taken or lost, Māori Treaty right to tino rangatiratanga should apply.⁶⁵ However, as history proves, the promise inscribed within the Treaty was not only never kept, but after many years of social, economic and cultural discrimination and loss of Māori knowledge and alien management over the knowledge, Māori people are still questioning their rights over their culture and resources as stated in the Treaty. In this regard, Wai 262 is complex and multifaceted because it tries to address who owns and controls Maori culture and identity and why. This underlines the fact that in Aotearoa/New Zealand, Māori people are not necessarily the one who control and own Māori culture and its expressions. As for a shared destiny among the indigenous peoples of the world, indigenous communities, in fact, do not

⁶¹ The First Amended Statement of the Claim, The Waitangi Tribunal, WAI 262, SOI 1.1(a) at para 3.1.

⁶² At para 3.1.

⁶³ See *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* Vol 2 (The Waitangi Tribunal, Wellington, 2011) at 504.

⁶⁴ At 505.

⁶⁵ “If an object is indeed found to have been wrongfully transferred, the iwi maintains a rangatiratanga interest in it, with all its implications of control and authority. ... no other interests can override the unextinguished rangatiratanga interest in taonga that have been wrongfully acquired or retained and are now held by our national museum, Te Papa. These must be offered to kaitiaki, and this process seems to be under way” see *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* Vol 2 at 508.

necessarily possess their own culture and therefore are not responsible for the future/destiny of their own knowledge (see Chapter 7, 8 and 9).

With the imposition of common law and property rights, traditional forms of knowledge failed to be included into the Western legal systems and, unprotected and unprotectable, have been forced to be subjected to too many alien rights that structurally failed to safeguard indigenous TK and cultural expression from any form of exploitation, colonization and economic monopoly. While Wai 262 recommendations speak at length of ‘partnership’, it seems that such a word is still a long way from becoming a reality. Most of the time, in fact, Māori and kaitiaki are left outside of any decision-making over their taonga. Māori do not attend museums’ board meetings, they do not directly access their taonga and cannot provide appropriate spiritual protection. Although Māori representatives are present within the biggest cultural institutions of New Zealand such as the Te Papa Museum, there is no statutory requirement for Māori presence in the Crown Research Institutions; which is highly incomprehensible, given the fact that the vast amount of Māori heritage is today stored in national museums, foundations and institutions.⁶⁶ When the Crown refers to property of the Crown, it implies a confiscation of Māori taonga and associated mātauranga Māori as well as the appropriation of rangatiratanga interests. What the claimants of Wai 262 tried to explain in 20 years of efforts, is that Māori symbols, stories, songs, dances and remedies have been over the years commodified by “people who have no traditional claim to them”,⁶⁷ and in doing so, Māori people lost much of their control over their own knowledge and its evolution. The claimants explained, with great consistency, that over time the role of the kaitiaki was diluted and their power over taonga species and taonga works was consequently

⁶⁶ Such as Archives New Zealand, NZ National Library, TVNZ, Radio New Zealand, Te Papa Tongarewa, Auckland Museum, Creative New Zealand; for further information see chapter 6 of the *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* Vol 2.

⁶⁷ “... native flora and fauna upon which their culture and identity have been built have been controlled, modified, and privatised by people, companies, or government agencies who have no affinity with those things, and they complain that Maori now must seek Crown permission even to gain access to or use them for cultural purposes. The claimants say they have no control over the physical and spiritual well-being of the lands and waters in their traditional territories. They say that their traditional healing practices were actively suppressed by the Tohunga Suppression Act and the Crown still offers them no real support. They say the Crown has taken direct ownership and control of matauranga Maori through its various agencies, and Maori have been excluded” see the Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* at 17.

reduced to a point that they could no longer intervene on matters that involved mātauranga Māori and taonga.

Who are the kaitiaki and why is their role so important? One of the core principles of tikanga Māori (Māori customary laws and Maori customs and traditions that have been handed down through the passage of time from ancestors) is that of 'kaitiakitanga' which is translated as guardianship or stewardship. Māori apply kaitiakitanga over people, lands, villages and taonga. Lai summarises the concept by describing kaitiakitanga as:⁶⁸

... an obligation that arises from [Māori] kin relationship, not only to people, but also to things that are believed to have a kin relationship according to Māori myths, legends and belief system. It can, thus, encompass land, waters, plants, wildlife and cultural works; and also intangible things such as language, identity, culture and mātauranga Māori. The obligation includes the care of both the physical and spiritual, requiring the nurturing of mauri (the life force). Those that have the mana (authority, power or supernatural force) to carry the responsibilities are called kaitiaki, which may be an individual, whānau (family), hapū (sub-tribe) or iwi. The kaitiaki are not responsible only for the taonga works, species and mātauranga Māori, they are also entitled to the benefits of the cultural and spiritual sustenance therefrom. This can include the economic benefits, if the commercialisation is in accordance with mātauranga Māori.

The next section is dedicated to a detailed description of the role of the kaitiaki in the Māori world (based on the documents of Wai 262) and how their role clashes with the Crown and New Zealand's laws.

⁶⁸ Jessica Christine Lai *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer International Publishing, New York, Dordrecht and London, 2014) at 230.

7.4 - Kaitiakitanga, Taonga Works, Taonga Species and the Laws of Aotearoa-New Zealand for the Preservation of Māori Culture

As for most indigenous communities of the world, a striking difference between Western values and indigenous ones defines them. On top of that, cross-cultural communication is never an easy task, especially when a language is imposed upon a foreign set of values and traditions that were never expressed with that language. As seen in chapter 4, most of the problems faced by indigenous peoples yesterday and today come from translating indigenous values and traditions into a language comprehensible to the Western world. Whether this is fair or not, is another story. That is why extensive parts of the Report have been dedicated to the description of Māori culture and traditions in terms that could be understood by Westerners and indigenous peoples. According to the Report, with taonga works Māori people consider all the technologies and arts associated with traditional Māori life, such as, mōteatea (traditional Māori chants utilising song poetry and melodies of limited range), patere (rhythmic chant with a more secular purpose than the karakia), carving, weaving, painting, constructions, crafts, stories, dramas and musical works. They include artistic and literary works, carving, weaving, paintings, crafts, written works, graphic works, musical works, oral traditions, performing arts, symbols, images and designs, artefacts and the mauri of the taonga works “where the work reflects in some way the culture and/or identity of the kaitiaki of the work and includes the knowledge, skills, cultural and spiritual values upon which the work is based”.⁶⁹ The Report defines taonga species as including genetic (genetic information encoded in the DNA sequence located in the cell) and biological (physical material that makes up the microorganism, plant or animal) resources and the traditional knowledge developed to deal with such resources.⁷⁰ Taonga are the products of mātauranga Māori and as such “embody key Māori cultural attributes such as mana, tapu, and mauri. Many have been made under tapu, fought over in battle, gifted to consolidate important alliances or relationships,

⁶⁹ See Wai 262, 2.314 The Flora and Fauna and Cultural Intellectual Property Claim, Statement of Issues (Waitangi Tribunal, Wellington, 2006) at 6.

⁷⁰ For further information see the Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* at chapter 1 and 2.

carved to represent ancestors, and so on. ... the objects have a whakapapa of their own that links them to the tribal ancestors who are depicted or who created them”.⁷¹ Some taonga are very ancient while some others are more modern, depending on their evolution over time. They can be tangible or intangible, or both at the same time. Taonga works can also be variably sacred and protected by different levels of secrecy. As it will be seen in the next chapters, the more secret the knowledge safeguarded, the more difficult it becomes to protect it. To be held in secrecy the knowledge does not have to be old or intangible. It can be fairly new and inclusive of sacred cultural expressions (taonga works).

Newly-created artistic and cultural works or new knowledge associated to taonga species are worthy of the same status as the ancient ones. The Report explains that “while age can certainly intensify the mauri of an artwork, taonga status depends on the extent to which a work embeds korero and invokes tribal ancestors”.⁷² However, contemporary art or knowledge, which has no whakapapa, no korero and associated kaitiaki, is commonly addressed as ‘taonga-derived’ and falls into a completely different category with associated rights and obligations. What taonga species and works have in common is the kaitiakitanga system of guardianship that safeguard them. Kaitiakitanga is “the obligation, arising from the kin relationship, to nurture or care for a person or thing”.⁷³ The perpetual kaitiaki relationship with taonga works and species, mātauranga and all the treasures is similar to the role of the guardians in most of the world indigenous societies (see chapter 2). Each taonga work has a kaitiaki, a person or entity that, because of lineage and calling, has an obligation to safeguard the taonga and the mātauranga that underlines it. “Kaitiaki can be spiritual guardians existing in non-human form. They can include particular species that are said to care for a place or a community ... Every forest and swamp, every bay and reef, every tribe and village ... anything of any importance

⁷¹ See *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* Vol 2 at 504.

⁷² At 514.

⁷³ Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* at 23.

to all in tea o Māori has these spiritual kaitiaki".⁷⁴ But people can also be kaitiaki and, in this case, have the obligation to:

- Protect
- Preserve
- Control
- Regulate
- Use
- Develop and/or transmit

Kaitiaki have the responsibility to protect the whakapapa⁷⁵ and korero of the work from any form of misuse and illicit exploitation. Their duty is not limited to safeguard the integrity of the work but also the knowledge intrinsic to the work, and pass it to future generation intact. Their role is not just about responsibility, but it is rather a life mission in which the guardians are allocated on the basis of their skills or genealogy and the customary laws of the community. As such, kaitiaki are consequently entitled to "benefit of the cultural and spiritual sustenance the taonga works provide to their community".⁷⁶ During the hearings, the claimants stressed the fact that not only taonga works had kaitiaki, but most of the country's indigenous species – if not all - and healing remedies and the knowledge associated with them were subjected to a system of guardianship/kaitiakitanga. In this case, kaitiaki are considered those people within the community that can feel the life force (mauri) that resides inside objects and species and are able to communicate with it. This means that not everybody can become a kaitiaki. Accordingly, the claimants argued that New Zealand law 'must' recognise the important relationship existing between kaitiaki and taonga species and should be given decisive say over the commercialization of taonga species in ways that are in breach of the customary laws and values of

⁷⁴ Supra at 22-23.

⁷⁵ "Whakapapa is defined as the 'genealogical descent of all living things from the gods to the present time. Since all living things including rocks and mountains are believed to possess whakapapa, it is further defined as "a basis for the organisation of knowledge in the respect of the creation and development of all things', ... Hence, whakapapa also implies a deep connection to land and the roots of one's ancestry. In order to trace one's whakapapa it is essential to identify the location where one's ancestral heritage began; you can't trace it back any further. Whakapapa links all people back to the land and sea and sky and outer universe, therefore, the obligations of whanaungatanga extend to the physical world and all being in it" see at <<http://en.wikipedia.org/wiki/Whakapapa>> last visited on 18/02/2013.

⁷⁶ See *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Vol 1 (The Waitangi Tribunal, Wellington, 2011) at 82.

the community. In the case that commercialization would be allowed by kaitiaki (by prior-informed consent system), then their participation in the benefit sharing should be guaranteed. In many cases the response brought forward by the Crown and National Institutions as Museums, Libraries and Archives is that taonga works and knowledge associated with taonga is well kept and preserved and Māori people should be happy that institutions are preserving their heritage for future generations. However, what the argument is missing is that not only much of that taonga was not supposed to 'widely' circulate, but once locked into institutions, they might not be looked after spiritually as they would if they remained in the custody of kaitiaki. Indeed, not only do such institutions have few Māori staff that can look after the taonga, but it is often not clear or guaranteed that they possess sufficient knowledge of Māori protocols over the sacred knowledge associated with the taonga.⁷⁷

As for many of indigenous peoples' claims, their requests often clash with the Western understanding of what constitutes values, ethics and morality. In Western societies, the universe is not explained by spiritual forces translated into words, symbols, knowledge and traditions. Science⁷⁸ examines and explains the universe and its phenomena. What eludes science is consequently denied. The scientific method is empirical; in other words, it heavily relies on evidence that can be 'directly observed and sensed'.⁷⁹ Science is not concerned with non-physical forces, and carefully avoids any contact with knowledge that cannot be directly tested. The fact that Western societies decided to limit their understanding of life to science, while explaining the non-physical world through religion, does not mean that such a decision is correct and legitimate. The fact that all indigenous societies of the world traditionally recognise a life force that

⁷⁷ See *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Vol 2 at Chapter 6.

⁷⁸ "The word science comes from the Latin 'scientia', meaning knowledge. How do we define science? According to Webster's New Collegiate Dictionary, the definition of science is 'knowledge attained through study or practice', or 'knowledge covering general truths of the operation of general laws, esp. as obtained and tested through scientific method [and] concerned with the physical world'. 'What does that really mean? Science refers to a system of acquiring knowledge. This system uses observation and experimentation to describe and explain natural phenomena. The term science also refers to the organized body of knowledge people have gained using that system. Less formally, the word science often describes any systematic field of study or the knowledge gained from it'" see at <www.sciencemadesimple.com/science-definition.html> last visited on 15/07/2015

⁷⁹ For further information see the Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* see Chapter 2 at 70.

permeates everything, is living proof that at some stage, societies were united in a common belief that everything is imbued with spiritual force and everything is the result of forces that transcend any empirical observation or testing. The fact that some societies evolved outside this collective unconscious belief, does not delegitimize their very existences and reasons for existing. Compared to the history of the world, science is, in fact, a very late acquisition. Ancient cultures of the world lived their lives holistically, following holistic values and laws (see Chapters 2, 3, 4 and 5).

Given the importance of protecting the life force and its de-codified symbolism, kaitiaki should be primarily involved in the management of the taonga species as custodians of the spiritual values encoded within the species itself and its utilization. As such, according to Wai 262 claimants, bio-prospectors “should not use the mātauranga Māori associated with taonga species without the consent of the kaitiaki”,⁸⁰ and use the species in a way that is inconsistent with the values of the kaitiaki and the customary laws of the community. Consequently, kaitiaki still retain their on-going cultural relationship with their taonga regardless of the circumstances of the alienation of the taonga. Kaitiaki reserve also the right of veto over the usage of the species in order to protect the integrity of such relationship and the spiritual values that are encoded in the species and in the relationship itself. The argument claimants used to justify this assertion is that the “kaitiaki relationship with taonga species is so all-encompassing it amounts to ownership of the genetic resources of that species”.⁸¹ On the same line, however, the Crown and representatives of New Zealand agencies replied that it would be risky to grant exclusive rights to Māori people and kaitiaki. The granting of exclusive rights would, in fact, impede the development of science, economy and knowledge in general. The Crown also responded that life forms are the patrimony of humanity and cannot belong to anyone. Article 27.3 (b) of the TRIPS Agreement states that “members may also exclude from patentability - plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and

⁸⁰ Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* see Chapter 2 at 74.

⁸¹ At 74.

microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof, which seems to indicate that life forms cannot be subjected to property rights, because they represent the common heritage of mankind and as such anyone can use them without exclusive rights. However, what can be safeguarded is the knowledge (spiritual and scientific) associated with the life form. Articles 15 and 8(j)⁸² of the CBD urges states to make a workable distinction between the “bare genetic resources”⁸³ and any traditional knowledge associated to the resource, as well as the guardians who make the survival of the knowledge possible. On this regard, the Crown explained that while it is legitimate to respect the knowledge and the relationship between kaitiaki and the resources and everything it includes, there is no reasonable justification to grant direct exclusive rights over the resource itself. On the other hand, Wai 262 claimants argued that the relationship between the resources and the kaitiaki is traditionally so ‘special’ and exclusive that it extends to both the genetic and biological resources of the taonga species. Consequently, kaitiaki could claim property rights over the resources inhabiting the territories they

⁸² CBD Article 8 (j) (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices: (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations: (1) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities: and (m) Cooperate in providing financial and other support for *in-situ* conservation outlined in subparagraphs(a) to (1) above, particularly to developing countries.

Article 15 - *Access to Genetic Resources* - 1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation. 2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention. 3. For the purpose of this Convention, the genetic resources being provided by a Contracting Party, as referred to in this Article and Articles 16 and 19, are only those that are provided by Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention. 4. Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article. 5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party. 6. Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties. 7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.

⁸³ Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* see Chapter 2 at 83

traditionally occupied. Any scientific manipulation of the resource would infringe the spiritual integrity of the species and corrupt the relationship that kaitiaki traditionally had with it. Having said this, whether kaitiaki can claim property rights over the species is another story. Common law and common-law-derived systems do not recognise information as property. As it will be explained in more detail in the last and concluding chapter, information, being it tangible, intangible or secret does not possess the same property rights granted to private property. Consequently, kaitiaki do not own what they protect. Their role implies a duty of care that includes rights and obligations in relation to their taonga works, but they are not property rights implying ownership. Kaitiaki themselves do not attach property rights to their role because it is not included within their system of customary laws. However, according to the Report, the longstanding and special associations with taonga works give kaitiaki rights that arise from their perpetual relationship. As such, the main concern of the claimants was whether the IP system in Aotearoa-New Zealand should recognise and incorporate kaitiakitanga into the national IP system (in relation to taonga works and mātauranga Māori) especially in light of the fact that IP laws are not designed to recognise and protect the 'perpetual' relationship of kaitiaki. They asserted that the New Zealand IP system should reasonably accommodate Māori interests over their resources and associated knowledge.

As explained in more detail in the next chapters, from their creation, IP rights have been designed to reward the creativity translated into a product of the mind in the fields of art, technology or science with exclusive rights over the production for a set period of time. The idea was to reward creators and encourage them to share their product with the world at large for a temporary commercial benefit after which everyone could use the creation freely. IP rights are never absolute, but constantly stretched between the interests of the creator in receiving a fair reward for the creation of his/her mind, and the wider interest of the community who will benefit from the advancement of their knowledge. In this regard, property focuses on the rights of the owners within the wider community, whereas kaitiakitanga "focuses on the obligations arising from

kinship”,⁸⁴ and how this obligations are performed in accordance with customary laws of the community. The fundamental difference lies in the fact that kaitiaki, like most of the guardians of knowledge present in indigenous communities, do not own the knowledge but perform acts that can be fundamentally similar to those intrinsically attached to the creator’s rights: protect, preserve, control, regulate, use, develop and/or transmit. The only aspects that are fundamentally different between the creator’s rights and kaitiakitanga are those involving economic rights. In fact, while the major justification for IP law is fundamentally economic, kaitiakitanga duties and obligations do not include a system of incentive and rewards and economic exploitation, but rather attaches moral values and spiritual awareness intrinsic to the knowledge safeguarded. As such, kaitiakitanga values and duties have no expiring date. They exist since and for as long as the knowledge exists. The other key difference is that the kaitiaki obligation is permanent and passed down to future generations while creators’ personal rights over their works expire after a set time. Another important aspect is that the ‘community’ benefits from the duties and obligations of the kaitiaki who protect the knowledge. In other words, the preservation of the knowledge resides in the fact that it is protected in the custody of the kaitiaki, and not in its wider circulation. Only kaitiaki’s management over the knowledge and its usage can guarantee the respect of the spiritual values intrinsic within the knowledge. In the Māori world, nothing is fundamentally distinct from the creation process, and consequently nothing exists without embodying spiritual values and metaphorical language whose interpretation is not necessarily known by most but rather by few.⁸⁵ Given the continuity of Māori traditions, kaitiaki

⁸⁴ Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* Vol 1 at 46.

⁸⁵ “Māori culture as we know it today is a creation of its environment ... The elements that make it distinctive in the world can be traced to the relationship kaitiaki [guardians] built up with the land, water, flora, and fauna of this place. In this way, the mauri, or inner well-being of land and water spaces, and the whakapapa [genealogy] of flora and fauna do not just serve to articulate the human relationships with these things; they are building blocks of an entire world view and of Māori identity itself. They play a similar role to the core definers of Western culture such as the arts, democracy, the rule of law, and so forth. But while the more human-centred Western culture tends to define itself by reference to its own thought and labour, Māori culture relies on pre-existing, pre-human definers – mountains, rivers, plants, animals, and so on. Māori culture seeks to reflect rather than dominate its surroundings. That is why the relationship between humans and taonga species is a definer of Māori culture itself. It is a preoccupation of the body of distinctive Māori knowledge that today we call mātauranga Māori” see Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* at 115-116.

have a perpetual relationship with taonga works. Their responsibilities include, but are not limited to, the preservation of the traditions as they have been transmitted since creation. This transmission is mostly oral and of old lineage. Although taonga works might differ one from another, they are all products of mātauranga Māori, and are all intellectual creations of Māori peoples, whether dead or alive. Moreover, all taonga works and their spiritual traditions have kaitiaki, which means that there are living individuals or groups of individuals that have a duty of care over the spirituality and the works in accordance with tikanga Māori. According to the Wai 262 Report, taonga works have kaitiaki for very important reasons:⁸⁶

... they have whakapapa – the quintessential element of anything important in te ao Māori. By this we mean taonga works bring ancestors to life. The ancestors may be the composers or artists who created the works or, more usually, the ancestors will be embedded in some way in the work. The second reason is these ancestors are brought to life in a context – that is, the taonga work tells an important story or teaches an important lesson, using the ancestor as its fulcrum. ... It is these characteristics that cause Māori to say that taonga works have mauri - they live – and that the primary obligation of kaitiaki is to protect the mauri of the taonga work.

The fact that Māori do not often have control over their taonga and the New Zealand IP laws do not enforce any protection over Māori TK and cultural expression can greatly harm the spiritual nature of taonga works and, over time, corrupt their transmission. According to Māori's culture and mythology "the greater the antiquity, the greater the mana of the taonga work because of its closer connection in time to the ancestors who provide the community with its identity, and because of the number of generations who will have cared for and revered it".⁸⁷ Conversely, as explained previously, taonga works are not necessarily ancient, but are created continuously as an integral part of the culture of Māori people and traditions. In the case of IP laws, on the other hand,

⁸⁶ Supra at 81.

⁸⁷ At 81.

while it is easy to grant protection to newly created taonga works (though the protection will be still limited in time), it might not be as easy to guarantee protection to the mana underlying the work and everything else that is part of the intangible of the expression (eg sacred information). On the same line, it might also be impossible to grant any right to the kaitiaki who safeguarded and transmitted the mana intrinsic in the work as conceived by Māori people since time immemorial. Their role is to protect the intrinsic spiritual value of the work from misuse. In theory, new taonga works can be created only under the approval and supervision of kaitiaki who, not only protect the physical integrity of the work, but pass the work, the responsibility and the knowledge to future generations. Obviously, the value of such a line of transmission rests in the incorruption of its spiritual traditions as known and safeguarded by kaitiaki. In order to do that, Māori people need to have the full control over their traditions and culture. In this regard, the object of the Wai 262 claim was to “acknowledge, respect and restore the tino rangatiratanga and mauri or life force embodied in the laws, customs and values of the claimants in relation to their indigenous flora and fauna *me o rātou taonga katoa*” (Claim 1.1(g) para 2.8) and all the rights associated to that. In this regard, the claimants stressed the fact that the Crown had not respected Māori rights of manaakitanga, kaitiakitanga and te tino rangatiratanga, and failed to “provide for and protect the existing systems of mātauranga Māori exercised by Ngāti Kuri, Te Rarawa and Ngāti Wai”.⁸⁸ According to the claimants, in 1840 Ngāti Kahungunu held collectively and individually a wide body of knowledge that included “indigenous flora and fauna, arts, crafts, history, waiata, language and all other cultural property and traditions”⁸⁹ of which Ngāti Kahungunu were kaitiaki. The Ngāti Kahungunu asserted that the Crown had violated their right to protect, transmit and benefit from the development of their cultural knowledge (Claim 1.1(d) paras 9-10). The same allegation was formally reported by the Ngāti Koata Ngāti Wai, Te Rarawa and Ngāti Kuri communities. In other words, what Māori people suggested in their totality or among specific communities is that, since the signing of the Treaty of Waitangi, the Crown has failed to recognise their

⁸⁸ See Wai 262 - Draft Statement of Issues (December 2005) at 33.

⁸⁹ At 33.

fundamental right to culture as stated in the Treaty of Waitangi (Art 2) as well as in several other international instruments of which Aotearoa/New Zealand is party.

7.5 – The Response of the Crown and the Recommendations of the Waitangi Tribunal

The Crown responded to the allegations presented by the claimants of Wai 262 by reminding the Tribunal that tino rangatiratanga cannot apply to general circumstances, such as oral traditions and traditional management of resources and taonga species, and Māori people are entitled to tino rangatiratanga over property and resources controlled and owned by them. One of the arguments used by the Crown was that the “promise of tino rangatiratanga” contained in Art 2 of the Treaty did not de facto include and guarantee property and/or proprietary rights and/or interests of a kind that was not known to, recognized, or capable of protection by English law in 1840 (Paper 2.256: 42). The fact that Māori people had customary laws of long lineage that actually safeguarded the transmission and management of tino rangatiratanga and everything included by it, was regarded by the Crown as inconsequential. Indeed, as reminded by the Crown, the English law in 1840 did not generally recognize private property or proprietary rights in:

- (a) flora (except to the extent that such rights arose as an incident of the ownership of the land upon which the flora grew) or in undomesticated fauna (SOR: 43.1);
- (b) landscapes and scenery per se (SOR: 43.2.1);
- (c) folklore, oral history and oral traditions (SOR: 43.2.2);
- (d) information per se (SOR: 43.2.3);
- (e) language per se (SOR: 43.2.4);
- (f) the human form (whether specific or general) (SOR: 43.2.5); and
- (g) human or animal tissue, genes or DNA (SOR: 43.2.6).⁹⁰

⁹⁰ See Wai 262 - Draft Statement of Issues (December 2005) at 35.

In other words, the fact that English law did not include these forms of private property defeats the attempts of the Treaty to guarantee Māori tino rangatiratanga, but it does not seem to defeat the possessions that the Crown acquired with the Treaty. This means that even though English law at the time had not developed to include these categories of private intellectual property, the fact that Māori people had developed a whole sets of rules and obligations protecting their traditions was still regarded as inconsequential even if no other law existed to counterbalance or defeat the complexity of Māori customary laws, including those regulating intellectual property and kaitiakitanga, created by Māori people. It seems that double standards consistently determine indigenous peoples' destinies all over the world. So, if Māori people are entitled to "tino rangatiratanga over property and resources controlled and owned by them", what is the participation of kaitiaki themselves in the exploitation (and not preservation)⁹¹ of taonga works and mātauranga Māori? What are kaitiaki's property rights over taonga works and mātauranga Māori – if any? Does perpetual custody guarantee property rights over taonga works and mātauranga Māori? Can exclusive control over knowledge be considered a form of property? Does the right to traditionally-owned or controlled territories extend to all the resources included within the borders of the territories? As shown in the previous pages, the perpetual relationship of kaitiaki with taonga works gives rise to rights and obligations which do not fall within the realm of property rights as defined by Western common law, but give them authority in determining the destiny of Māori traditions as stated in the Treaty of Waitangi.⁹² Whether kaitiaki authority is respected, is another story. The Crown argued that New Zealand current IP laws accommodated Māori interests 'sufficiently', and that creating laws that would give exclusive rights to Māori people would limit innovation and "deprive others of access to the knowledge and ideas which underpin or inspire the creation of new works".⁹³ The argument brought forward by the Crown seems to be slightly discriminatory. In other words, while in Western societies a

⁹¹ The report speaks of exploitation and not preservation of Maori TK and TCEs.

⁹² Article 2 of the Māori version of the Treaty states that: ... The Queen of England agrees to protect the chiefs, the sub tribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures.

⁹³ Summary of the Report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* at 34.

creator/inventor has the option to keep his/her work/invention for himself/herself or to bring it to the public making a profit out of it, indigenous peoples do not seem to have the same option. Their knowledge is valuable and it should enter the public domain so that everyone could benefit from it (especially national and international multinationals). In other words, centuries of customary laws and perpetual control over the knowledge by kaitiaki counts for nothing. The Crown also stressed that the membership of Aotearoa-New Zealand in important international agreements, such as the World Trade Organization and the Convention on Biological Diversity, sometimes trumps the national attempts to create *sui generis* legislation specifically designed to include indigenous peoples' rights. As will be seen later in the thesis, both the TRIPS Agreement and the Convention on Biological Diversity set high minimum standards that leave enough space for states to create *sui generis* legislation that would better accommodate indigenous claims within national borders. To nullify the creation of such legislation on the pretense that they will not comply with the Agreements' minimum standards sounds a bit like an excuse to carry on avoiding the problem. In this regard, the main concern of the Tribunal to be addressed remained to what extent the "guarantee of *tinio rangatiratanga* should be used to offer a reasonable level of control to Māori over *mātauranga Māori*, *taonga* works and *taonga* species".⁹⁴ The Report, in fact, stresses that the kaitiaki relationship is the key element and it is what should ultimately be protected. In the case of *taonga* works, the Tribunal agreed that every claim should be addressed in a case-by-case three stages process:⁹⁵

- understanding the relationship between the kaitiaki and the particular *mātauranga Māori*, *taonga* work or *taonga* species;
- identifying any other valid interests in the *mātauranga Māori*, *taonga* work or *taonga* species; and
- balancing the other interests against those of the kaitiaki.

⁹⁴ Jessica Christine Lai *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* at 232.

⁹⁵ At 232 Lai citing Wai 262 Report at 80, at 193-195

In this scenario, according to the Tribunal, a legal framework should be created ad hoc to allow kaitiaki to prevent any misappropriation, misuse and derogatory public use of the taonga works and the spiritual secret knowledge they embody if it can be proved that the mātauranga Māori is closely held, and its use is inconsistent with “the integrity or mauri of either the work or mātauranga”.⁹⁶ However, in her book Lai⁹⁷ argues that the Tribunal did not enter into any clear explanation of what ‘closely held’ means and whether the misuse of Māori culture could happen within the Māori community itself. Article 2 of the Treaty protects the kaitiaki relationship. As such, while the kaitiaki have no say in knowledge that has already entered the public domain (although the kaitiaki relationship with such knowledge might still be in force), they should be able to challenge the future commercialization of their culture. However, if the kaitiaki did not perform their duty of care according to their customary laws and consequently failed to hold their culture closely, letting it flow into the public domain, no right to object to any future commercialization should be granted.⁹⁸ On the same line, the Counsel for the claimants⁹⁹ argued that the “mana (authority, prestige, reputation and spiritual power) should be returned to those who have, by whakapapa (genealogy, ancestral connections and lineage) and membership of the relevant iwi or hapu, inherited the right to exercise the role of owner and kaitiaki”.¹⁰⁰ In order to do that, the Tribunal recognized that a new process of communication and consultation between the Crown and Māori representatives should be established. This ‘Process of Engagement’ between the kaitiaki and the Crown would be “designed to identify the means of resolving the claim issues”.¹⁰¹ Counsel proposed the creation of eight Crown-funded working groups that would develop solutions to the issues brought forward by the Wai 262 enquiry under the supervision of a coordinating group comprising representatives of the claimants, the Crown, other iwi, Crown Research

⁹⁶ *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* Vol 1 at 84.

⁹⁷ See Lai *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?*.

⁹⁸ At 240.

⁹⁹ Counsel for Nagati Koata, see Chapter 9 in *Ko Aotearoa Tenei: Te Taumata Tuarua - A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* Vol 2.

¹⁰⁰ See *Ko Aotearoa Tenei: Te Taumata Tuarua - A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* Vol 2 at 701.

¹⁰¹ At 700.

Institutes, and the public.¹⁰² The Tribunal also recommended the creation of a commission (Māori Law Reform Commission) with the mandate to deal with any complains regarding the use of taonga works, taonga-derived works and mātauranga Māori and to “produce for iwi and the Crown proposals to reform the law of Aotearoa to provide full and balanced relief from any Crown Treaty breaches found by the Tribunal”.¹⁰³ Although the commission would not have any capacity to create new IPR laws or establish property rights for kaitiaki, it would be a *sui generis* system capable of operating outside existing IP law by recognizing the kaitiaki perpetual relationship. In this system, the kaitiaki relationships would be weighted case-by-case and depending on circumstances.¹⁰⁴ As clearly explained by Lai, the commission would “specifically relate to the Treaty obligation to protect tino rangatiratanga (rather than exclusive and undisturbed possession) over taonga. The proposed framework would create a statutory participatory right in making decisions over the commercial use of the taonga works and closely-held mātauranga Māori. The right would be potentially perpetual, dependent on the kaitiaki relationship”.¹⁰⁵ The Tribunal recognized that New Zealand IP laws are not designed to include the interests of kaitiaki, therefore they cannot be considered the only means to

¹⁰² At 701.

¹⁰³ At 701.

¹⁰⁴ “This includes the creation of an objective-based, case-by-case system. Its practical outcome should be to provide a balanced way to prevent any derogatory or offensive public use of mātauranga Māori, taonga works, or taonga-derived works, and to provide an effective way for commercial users to consult kaitiaki or seek their consent where the kaitiaki relationship warrants it. The core mechanism to bring this about would be a commission composed of experts in mātauranga Māori, IP law, commerce, science, and stewardship of taonga works and documents, assisted by a secretariat drawn from the same areas of expertise. A very important function of such a commission would be to educate prospective users of taonga works and mātauranga Māori, and to facilitate early consultation between aspiring users and kaitiaki. ... The commission could achieve these ends by drawing up guidelines for best practice, making declaratory rulings where these are sought, and developing a register of kaitiaki for particular works. We [the Tribunal] expect it would become the first port of call for prospective users, providing them with essential advice and guidance. In these ways, the system would focus on providing early certainty and ought to avoid undue interference in research, creativity, beneficial uses, and the mutual enriching of our cultures. The commission would adjudicate disputes. An objection-based system, in which the commission balances the kaitiaki interest, the interests of existing and prospective IP owners, and the interests of the community in development and beneficial uses, would be a principled and transparent way to determine how much protection should be accorded the kaitiaki interest in any particular case. In legislating for the commission process, we recommend that anyone should be able to object to offensive or derogatory public uses of taonga works, taonga-derived works, and mātauranga Māori. We also recommend that only kaitiaki could make other kinds of objection to commercial use, and then only for taonga works and mātauranga Māori. The commission’s decisions should be enforceable in the courts. Kaitiaki would need to demonstrate their status, either through the register or before the commission, with opportunity for others to challenge that status” see *Ko Aotearoa Tenei: Te Taumata Tuarua - A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* Vol 2 at 702-703.

¹⁰⁵ See Lai at 250.

protect the kaitiaki relationship with mātauranga Māori and taonga works. Such protection, on the other hand, represents the heart of the Treaty of Waitangi that guarantees tino rangatiratanga (authority and control over taonga). The creation of a commission could collide with existing laws and would guarantee the revocation and rejection of IP marks that are held in custody or are derogatory and offensive for a very limited section of the community, preventing the rest of the people from benefiting from the circulating of the information. This would also introduce in New Zealand subjective standards of analysis according to which situations related to Māori culture should be judged under different parameters. However critical this scenario might be, the recommendations brought forward by the Tribunal are designed for a country, like New Zealand, that is based on biculturalism. Biculturalism itself implies that two national cultures must find the way to coexist in the shared territory they inhabit. Such co-habitation would not clash with the international obligations that bind New Zealand to international agreements. TRIPS's high-minimum standards, for example, are not inconsistent with the creation of a *sui generis* system for the protection of kaitiaki relationship. Obviously the new system would have to work with or integrate the existing IP system or support the creation of a new one.¹⁰⁶ Although the recommendations present obvious limitations, they nonetheless represent an important step forward for future legal considerations on indigenous guardianship. It is true that the role of the Waitangi Tribunal is not to draft comprehensive legal solutions, but rather to provide recommendations and directions to policymakers regarding the practical application of Treaty Principles. However, the Tribunal's Report provides in clear language an in depth analysis of Māori culture and what role the guardians of knowledge play within their communities, what information they have in custody and how their duty of care can be safeguarded from external abuse, misuse and exploitation. The only great limitations that the recommendations have included are:

¹⁰⁶ Ko Aotearoa Tenei: Te Taumata Tuarua - A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity Vol 2 at 702.

1. the conclusion that it is not appropriate to see the kaitiaki relationship with taonga works and species as one of exclusive ownership;¹⁰⁷
2. kaitiaki would “need to demonstrate their status, either through the register or before the commission, with opportunity for others to challenge that status”. In other words, kaitiaki do not benefit from the right to self-determine what their traditional status as guardians entails and why; and
3. the inconclusive analysis of the role of the kaitiaki when it involves high levels of secrecy for the preservation of spiritual traditions. In the case of sacred/secret knowledge, the Tribunal suggests that the best way to safeguard it is to keep it secret. However, as discussed in the previous and next chapters, most of the information protected by kaitiaki is very sensitive and the only way to preserve it and protect it is to keep it secret from the rest of the community and the public.

It is true that the Tribunal’s recommendations advocate the amendment of New Zealand relevant laws to give the kaitiaki relationship formal protection, however, they also need to find a compromise with national legislation and Māori expectations.

As the next chapters will show, it is difficult to amend a legal system that was not originally inclusive of indigenous peoples’ needs and expectations. Although indigenous culture is today widely discussed within Intellectual Property and Human Rights systems,¹⁰⁸ its intangible aspects still struggle to find effective protection. In the Western IPR legal system, intangible sacred information held closely and secretly by custodians struggle to find protection. First, because it is difficult to describe what constitutes intangible secret information/culture, and second because intangible knowledge can widely differ from one indigenous community to another. As the thesis will progressively show, secrecy itself can become the key factor to be taken into account for the protection of the secret, intangible knowledge (and its tangible expressions) that is today still in the custody of indigenous custodians.

This chapter has discussed the specific case of guardianship in Aotearoa-New Zealand and how New Zealand is struggling to accommodate Māori claims. It has

¹⁰⁷ At 703.

¹⁰⁸ See chapter 8.

also shown how, in most of the cases, modern NZ IP law is ineffective in safeguarding indigenous sacred/secret knowledge held by the guardians. The next chapter will present and discuss in detail the international IP law system, focusing on what is just about being done and what needs to be done to include in its statutory regulations the protection of indigenous intangible culture.

Chapter 8

International Intellectual Property Law: An Ineffective System to Safeguard Indigenous Culture

This chapter is an overview of the IP legal system. While chapter 5 and 6 have addressed indigenous peoples' cultures from the perspective of international and human rights law with a reference to the fact that human rights and intellectual property laws, while traditionally distant, are narrowing their gap to a more effective protection to indigenous cultures, this chapter and the next focus on intellectual property law. Attempts are being made to modify intellectual property law to include and accommodate indigenous claims related to secret knowledge and practices, but there remains considerable work to be done.

8.1 - The World Intellectual Property Organization and Indigenous Peoples

The World Intellectual Property Organization (WIPO) considers Intellectual Property¹ to be “creations of the mind such as inventions, industrial designs, literary and artistic works, symbols, and names and images”.² In 1967, the Convention Establishing the World Intellectual Property Organization gave the following list of subject matters protected by intellectual property rights:³

- literary, artistic and scientific works

¹ “Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce. IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish” see WIPO at <www.wipo.int/about-ip/en/>.

² “The notion ‘intellectual property’ is defined in the Convention Establishing the World Intellectual Property Organization (WIPO), 1967 to include rights relating to: literary, artistic and scientific works; performances of performing artists, sound recordings, and broadcasts; inventions in all fields of human endeavour; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and, all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields” see Johanna Gibson *Community Resources* (Ashgate, UK and USA, 2005) at 11.

³ See WIPO “Understanding Copyright and Related Rights” at <www.wipo.int/about-ip/en/> last visited on 19/08/2012.

- performances of performing artists, phonograms, and broadcasts
- inventions in all fields of human endeavour
- scientific discoveries
- industrial designs
- trademarks, service marks, and commercial names and designations
- protection against unfair competition
- and “all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields”.

WIPO recognises several international standards that can today be identified and used as relevant background for the protection of TK and TCEs:

- The Berne Convention (1886, last amended in 1979) – economic and moral rights in artistic and literary works where these are expressions of traditional cultures, including anonymous and unpublished anonymous works (Article 15) and the possibility of protecting unfixed works (Article 2(2));
- The Paris Convention (1883, last amended in 1979) – protection of collective and certification marks, protection of armorial bearings, flags, other State emblems, official signs and hallmarks (Article 6*ter*), the protection of industrial designs, the protection of patents on innovation in a traditional context, and the suppression of unfair competition (including false indications that products are traditional or associated with an indigenous or local community);
- The WIPO Performances and Phonograms Treaty (WPPT, 1996) – the protection of performances as expressions of folklore;
- The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958, last amended in 1979) – the protection of appellations of origin related to products that embody traditional knowledge or are associated with traditional cultures;
- The Madrid Agreement Concerning the International Registration of Marks (and the Madrid Protocol) (1891, last amended in 1979) – the protection of certification marks relating to products of traditional origin;
- The Patent Cooperation Treaty (1970, last modified in 2001) – the PCT system may be used to facilitate protection for innovations within a traditional context; and the minimum documentation specified under the PCT is being expanded to give more explicit recognition of TK as prior art;
- The Strasbourg Convention on the IPC (1971, last amended in 1979) – the International Patent Classification has recently been revised to take better account of TK subject matter, and further proposals are under development;
- The WTO TRIPS Agreement (1994) – a range of IP rights recognized under TRIPS have been reported as applicable to traditional subject matter; apart from those categories noted above, TRIPS provides for two categories of protection that have been used for the protection of subject matter associated with TK and TCEs - geographical indications (a category broader in scope than appellations of origin) and undisclosed information (confidential information or trade secrets),

linking both forms of protection to the suppression of unfair competition under the Paris Convention.⁴

IP law promotes progress and, therefore, it does not protect an idea, but its reproduction along with the intrinsic, economic value it can have once entered into the public domain. The value given to the reproduction of the idea reflects European economic, moral and legal standards at the time of the creation of Copyright and Patent law⁵ (and their ensuing revisions). In their history, Copyright and Patent Laws had a different evolution from the other IP laws (eg trademarks, certification marks, trade secrets etc). They emphasise the rights of individual ‘authors’ and ‘inventors’ of new works and industrial property and guarantee temporary monopoly rights over the creation/invention. WIPO defines inventions as “new solutions to technical problems”,⁶ whereas copyright protects only “the form of expression of ideas, not the ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colors and shapes”.⁷ The property rights guarantee the owner the utilization of his product as he wishes, and hinder the utilization of the product by third parties. However, it is important to note that both the Paris Convention for the Protection of Industrial Property⁸ and the Berne Convention for the Protection of Literary and Artistic Works⁹ do not include in their language any

⁴ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2007) Doc WIPO/GRTKF/IC/11/9 at 17.

⁵ “The history of patents does not begin with inventions, but rather with royal grants by Queen Elizabeth I (1558-1603) for monopoly privileges ... Approximately 200 years after the end of Elizabeth's reign, however, a patent represents a legal [right] obtained by an inventor providing for exclusive control over the production and sale of his mechanical or scientific invention ... [demonstrating] the evolution of patents from royal prerogative to common-law doctrine” see Adam Mossoff “Rethinking the Development of Patents: An Intellectual History, 1550-1800” (2001) 52 *Hastings Law Journal* at 1255.

⁶ “These new solutions are ideas, and are protected as such; protection of inventions under patent law does not require that the invention be represented in a physical embodiment. The protection accorded to inventors is, therefore, protection against any use of the invention without the authorization of the owner” see WIPO “Understanding Copyright and Related Rights” at 5 see electronic document <www.wipo.int/about-ip/en/> last visited on 29/11/2012.

⁷ “So copyright law protects the owner of property rights against those who copy or otherwise take and use the form in which the original work was expressed by the author” *supra*.

⁸ “The Paris Convention applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models (a kind of ‘small-scale patent’ provided for by the laws of some countries), service marks, trade names (designations under which an industrial or commercial activity is carried out), geographical indications (indications of source and appellations of origin) and the repression of unfair competition. The Paris Convention, concluded in 1883, was revised at Brussels in 1900, at Washington in 1911, at The Hague in 1925, at London in 1934, at Lisbon in 1958 and at Stockholm in 1967, and was amended in 1979 <www.wipo.int/treaties/en/ip/paris/summary_paris.html> last visited on 15/07/2015.

⁹ The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at PARIS on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at

exhaustive definition of ‘inventions’, ‘industrial designs’ or ‘literary and artistic works’. WIPO explains that copyright law generally includes two types of protection: “economic rights allow the rights owner to derive financial reward from the use of his works by others. Moral rights allow the author to take certain actions to preserve the personal link between himself and the work”.¹⁰ Like copyrights, patents¹¹ are granted for inventions and are limited in time (20 years). On a different line, the other set of IP laws, including certification marks and trademarks, are potentially unlimited in time and they do not confer monopoly rights, but they limit the use of certain symbology to the people of a defined group, or geographical location. Certification marks do not focus only on individuals, but include groups of individuals that participate in the creation process.

Intellectual Property rights (IPR, mostly copyrights and patents) have existed for a very long time and are historically the result of national laws that, over time, have been translated and enforced at the international level as well.¹² According to Blakeney, in some countries IPR exist not only because of national jurisdictions, but as a result of international treaties, conventions, agreements that have set the standards for the national jurisdictions consequently.¹³

Paris on July 24, 1971, and amended on September 28, 1979
www.wipo.int/treaties/en/text.jsp?file_id=283698 last visited on 15/07/2015.

¹⁰ “Most copyright laws state that the author or rights owner has the right to authorize or prevent certain acts in relation to a work. The rights owner of a work can prohibit or authorize: its reproduction in various forms, such as printed publications or sound recordings; the distribution of copies; its public performance; its broadcasting or other communication to the public; its translation into other languages; its adaptation, such as a novel into a screenplay” see electronic document www.wipo.int/about-ip/en/.

¹¹ A patent is “an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. To get a patent, technical information about the invention must be disclosed to the public in a patent application” see WIPO at www.wipo.int/patents/en/ last visited on 15/07/2015.

¹² “The legal sources of international law which are applicable to the international intellectual property regime, as well as all other fields of international law, are conveniently set out in Article 38 of the Statute of the International Court of Justice. This Article provides that the Court, in resolving the disputes which are referred to it, shall apply: 1. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; 2. international custom, as evidence of a general practice accepted as law; 3. the general principles of law recognized by civilized nations; 4. Subject to the provisions of Article 59[which, inter alia, allows the court to call witnesses and experts] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law” see Michael Blakeney “International Intellectual Property Jurisprudence After TRIPs” in David Vaver and Lionel Bently (eds) *Intellectual Property in the New Millennium: Essays in Honor of William R. Cornish* (Cambridge University Press, Cambridge, 2010) at 3.

¹³ See Michael Blakeney “International Intellectual Property Jurisprudence After TRIPs” at 3.

Article 6*bis* of the Berne Convention confers moral rights to creative productions.¹⁴ Contrary to copyright and patent law, moral rights do not confer an economic right to the author of a work, but grant protection to the honour and reputation of the author by preventing “any distortion, mutilation or other modification of, or other derogatory action”. The fact that moral rights do not confer economic value to the product of the mind even once the economic right over it is transferred could serve indigenous peoples’ interests over their knowledge; however, moral rights are only granted to individual creators/authors, and are limited in time at least until “the expiring of the economic rights” of the creation they protect. Article 9.2 of the Berne Convention encourages states “to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”. However, as explicitly stated, the article does not include collective authorship over sacred and secret knowledge because it does not address culture holistically.

In recent years IP has been called upon to address many issues on indigenous peoples’ knowledge as well as its misuse and misappropriation, while trying to stretch the borders of its judicial applicability to include, very marginally, indigenous peoples’ interests. The issue of IP protection of indigenous culture and knowledge was, for example, already raised in 1967 at the Stockholm revision of the Berne Convention when Article 15(4)¹⁵ of the Convention was

¹⁴ Article 6*bis* of the Berne Convention states that: “(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained”.

¹⁵ Article 15(4) of the Berne Convention as incorporated into the TRIPS Agreement is mainly directed at the protection of folklore. It deals with unpublished works where the identity of the author is unknown, but where there is every ground to presume that he or she is a national of a given WTO Member. In such a situation the Member concerned may designate a competent authority to protect the interests of the author. Other Members should be informed about this authority by means of a notification giving full information’ see Council for Trade-Related Aspects of Intellectual Property Rights, Notification Provisions of Intellectual Property Convention Incorporated by Reference Into the TRIPS Agreement but not Explicitly Referred to in it, World Trade Organization (1995); for further information on the Stockholm revision see Eva Hemmungs Wirtén “Colonial Copyright, Postcolonial Publics: The Berne Convention and the 1967

revised to include the case of “unpublished works where the identity of the author is unknown”.¹⁶ Although the revision took into consideration the case of unknown authorship, it still referred to individual authorship and not to group authorship and communally owned/safeguarded knowledge as in the case of the guardians of knowledge or TK holders.

Arguably, it is today pointless to criticize the original objectives of IP laws, given the fact that, since its creation, it was never expected to include the intellectual and cultural rights of the minorities or other distinct cultures. What can be done is to accept the unsuitability of a system and work to reform it in a way that is inclusive of the rights of minorities. The real question is: do states and governments have actually any sincere desire to reform IP laws to include the cultural rights of indigenous peoples? Or do they rather prefer to ‘pretend’ they are actually working towards the development of an egalitarian system embracing all cultural diversity of the world? One of the solutions suggested at the national and international level to bridge the ethical and legal divide between Western IP laws and indigenous peoples’ products of the mind includes the creation of *sui generis* laws that would take into consideration, in an inclusive way, the customary laws that have traditionally managed the circulation of information (spiritual and non) within the community.¹⁷ However, in this case, it is often argued that it is not fair for the general market to create *sui generis* regulations granting exclusive rights to indigenous guardians of knowledge and TK holders. This argument seems to focus on the idealist idea of an egalitarian world where everybody has similar political, economic and cultural rights. However, the arguments cannot stand on the logic of its own reasoning: Western monopoly created a legal system that did not include the rights of indigenous peoples. Not only that, but over the centuries Western societies failed to amend the legislation they had created in order to include the rights of

Stockholm Diplomatic Conference Revisited” electronic document <www.law.ed.ac.uk/ahrc/script-ed/vol7-3/wirten.asp> last visited on 30/11/2012.

¹⁶ Article 15.4 (a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union’ as revised in 1967.

¹⁷ See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Twenty-Seventh Session (Genève, 2014) Doc WIPO/GRTKF/IC/27/1 PROV. 3; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Twenty-Eighth Session (Genève, 2014) Doc WIPO/GRTKF/IC/28/5.

the minorities (IP laws are in fact a set of laws that have been circulating for centuries).¹⁸ This explains why it is today so challenging for WIPO to amend the IP international system. To this end, in 2008 WIPO conducted a Gap Analysis to identify the gaps within the IP system that are currently preventing any effective protection of indigenous TK and TCEs. Gaps have been identified in the definition of TK and TCE. WIPO summarised such gaps as the failure to:

- Recognise the intrinsic value of TK systems.
- Recognise that TK systems are valuable forms of innovation.
- Promote respect for TK systems and the cultural and spiritual values of the holders of TK.
- Respect the rights of holders and custodians of traditional knowledge.
- Promote conservation and preservation of traditional knowledge.
- Strengthen traditional knowledge systems, including supporting continuing the customary use, development, exchange and transmission of traditional knowledge.
- Support continuing innovation within traditional knowledge systems and encouraging innovation derived from the traditional knowledge base.
- Support the safeguarding and preservation of traditional knowledge.
- Repress misappropriation and unfair and inequitable uses of traditional knowledge, and promote equitable benefit-sharing from traditional knowledge.
- Ensure that access and use of traditional knowledge is subject to prior informed consent.
- Promote sustainable community development and legitimate trading activities based on traditional knowledge systems.
- Curtail the grant or exercise of improper intellectual property rights over traditional knowledge.¹⁹

¹⁸ See history of intellectual property laws electronic document <www.wipo.int/export/sites/www/wipolex/en/notes/gb.pdf> last visited on 15/07/2015.

¹⁹ WIPO Secretariat, Intergovernmental Committee on Intellectual Property and Genetic Resources, *Traditional Knowledge and Folklore: The Protection Of Traditional Knowledge: Draft Gap Analysis*, WIPO, 13th Session (Geneva, 13-17 October 2008) WIPO/GRTKF/ IC/13/5(b) at 24-25 electronic document <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_13/wipo_grtkf_ic_13_4_b_rev.pdf> last visited on 12/08/2017.

In the specific, gaps within the legal system have been identified. WIPO has consequently provided a list of options to address these gaps such as:

- (i) A binding international instrument or instruments.
- (ii) Authoritative or persuasive interpretations or elaborations of existing legal instruments.
- (iii) A non-binding normative international instrument or instruments.
- (iv) A high-level political resolution, declaration or decision, such as an international political declaration espousing core principles, stating a norm against misappropriation and misuse, and establishing the needs and expectations of TCE/TK holders as a political priority.
- (v) Strengthened international coordination through guidelines or model laws.
- (vi) Coordination of national legislative developments.
- (vii) Coordination and cooperation on capacity building and practical initiatives.²⁰

As the list shows, the creation of legislation successfully safeguarding indigenous cultures is still a work in progress. Awareness about existing gaps does exist, but it needs to be translated into effective amendments of the IP system nationally and internationally. Indeed, only the joint cooperation of states would bring comprehension and comprehensible harmonisation of indigenous needs and expectations.

As we have seen in the chapter on Wai 262, states and international organizations are today trying to amend this ongoing injustice for a few simple non-altruistic reasons: indigenous voices are today strong; more international human rights instruments recognize the fundamental rights of indigenous peoples; and some world groups of indigenous stakeholders have become successful and educated on their political and economic rights. According to WIPO, existing IP law systems have already acknowledged customary laws, as a specific point of reference and as an autonomous system of laws used by specific ethnic groups.²¹ As such, given the limited referentiality that indigenous

²⁰ Supra.

²¹ See WIPO "Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues" (2013) at <www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf> last

customary laws have, they can only play a role of exceptions and advisory mechanisms to existing laws, *sui generis* or not, and only in those countries which recognise indigenous customary laws as a legal body of laws.²² As Dove suggests the originating communities of the TCE and TK and the ones who guard the knowledge should have a say on what constitute the TK that needs protection and explain in their own voices why their own traditions and symbols can be used (when required).²³ Dove rightly recognises that TK has holistic distinctive qualities that alone should require the presence and supervision of the guardians of knowledge and TK holders. On the same line, Taubman argues that examples of “responsible custodianship” over TK “within customary laws systems can itself be a model for a comprehensive blending of rights and obligations”²⁴ embracing the complexity of TK manifestations that a state could implement on a larger scale. As Correa rightly points out in his report for the World Health Organization²⁵, (in his article he refers mostly to traditional medicine, but the same argument could be applied to TK in general) only those who guard the knowledge and manage its use within the community can know what kind of *sui generis* legislation could effectively safeguard their culture and guarantee property rights not to those who receive the knowledge, but to those who guard it and transmit it.

In the *Bulun Bulun* case²⁶ the court extended copyright protection to cover original new artworks based on existing TK, giving recognition to the traditional practices in use within the Ganalbingu people. The Federal Court of Australia

visited on 05/02/15; see also Brendan M Tobin “Bridging the Nagoya Compliance Gap: the Fundamental Role of Customary Law in Protection of Indigenous Peoples’ Resource and Knowledge Rights” (2013) 9 2 *Law, Environment and Development Journal* electronic document <www.lead-journal.org/content/13142.pdf> last visited on 05/02/15.

²² See WIPO “Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues” (2013) at 23 at <www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf> last visited on 05/02/15; see also Brendan M Tobin “Bridging the Nagoya Compliance Gap: the Fundamental Role of Customary Law in Protection of Indigenous Peoples’ Resource and Knowledge Rights”.

²³ Michael R Dove “Center, Periphery, and Biodiversity: a Paradox of Governance and a Development Challenge” in Stephen Bush and Doreen Stabinsky (eds) *Valuing Local Knowledge* (Island Press, 1996) at 41.

²⁴ Antony Taubman “Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge” in Keith E Maskus and Jerome H Reichman (eds) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, 2005) at 543.

²⁵ Carlos M Correa *Protection and Promotion of Traditional Medicine Implications for Public Health in Developing Countries* (University of Buenos Aires, 2002) electronic document <<http://apps.who.int/medicinedocs/en/d/Js4917e/>> last visited on 03/12/12.

²⁶ *John Bulun Bulun & Anor v R & T Textiles Pty Ltd* ('Bulun Bulun') FCA 3 September 1998 per Federal Court of Australia Von Doussa.

recognized that Mr Bulun Bulun's artwork was original and held that the copyright of the work resided with him as distinct creator. However, the Court did not recognize communal title to the work held and the joint authorship of the community. The Court dismissed communal title, but recognized the fiduciary relationship between the artist and his clan that had granted Mr Bulun Bulun the permission to use the ritual knowledge of the clan as spiritual and symbolic embodiment of the artwork. In this case, however, the fiduciary relationship between artist and clan was not substantial enough to give copyright rights to the community as a whole or to the guardians of the knowledge as a fiduciary group.

Intellectual Property law is concerned with the creation itself rather than the knowledge that resulted in the creation. For the Western world it does not matter who has the idea; the right rests on the person who fixes the idea while the market decides the value of the product. Under IP law an "essentially objective external standard"²⁷ is applied to determine whether the product of the mind in question complies with a specific criteria utilized by the IP legislation; and the eligibility of the subject matter is not necessarily defined by the context of its origin or whether one or more persons participated in its creation/invention. In indigenous societies, spiritual values vary from one community to another; and some knowledge cannot be utilized outside the cultural context of the community. In this case, only the custodians of the knowledge know the commercial value of the knowledge. The right holder among indigenous peoples is the one who has custody over the knowledge, without owning it; its perception of the value of the knowledge might be subjective or traditionally transmitted with the knowledge and has nothing to do with the fact that the knowledge is original or not, or if an invention is non-obvious. The eligibility given to the transmission of the information encrypted in the knowledge is based on customary laws that control the transmission and determine who is entitled to receive the information.

²⁷ Antony Taubman "Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge" at 540.

8.2 – *Sui Generis* Laws Implemented at National Level

A *sui generis* system means “one that is of its own kind”. In the case of indigenous TK it refers to “the creation of a new national law or the establishment of international norms that would afford protection to intellectual property dealing with genetic resources -or biodiversity - and the biotechnology that might result. It also refers to a law that might protect creations, inventions, models, drawings, designs, innovations contained in images, figures, symbols, petroglyphs, art, music, history and other traditional artistic expressions”.²⁸ In general *sui generis* laws refer to TEK (traditional ecologic knowledge) and biodiversity. They mostly refer to the tangible aspect of TK, leaving out any effective consideration for the intangible, secret aspect that TK might have.

Some countries have today created *sui generis* laws based on benefit sharing and prior informed consent to safeguard the indigenous TK present in their soil. To give few examples, Guatemalan law has revised its national law to include and protect TK as part of the national heritage, preventing outsiders to dispose of it through contracts and arrangements. Panama established Law no. 20 (June 2000) covering ‘indigenous peoples’ creations, such as inventions, designs and innovations, cultural historical elements, music, art and traditional artistic expressions’ where “collective exclusive rights are accorded to registered elements of traditional knowledge”.²⁹ In 1997, Philippines enacted the Indigenous Peoples’ Rights Act which protects indigenous communities’ rights in general “including their rights in traditional knowledge, including the rights to limit the access of researchers into their ancestral domains/lands or territories, to be designated as sources of information in whatever writings and publications resulting from research, and to receive royalties from the income derived from

²⁸ International Intellectual Property Institute (IIPi) “Is a Sui Generis System Necessary?” (2004) at 1 electronic document <<http://iipi.org/wp-content/uploads/2010/07/NewYork011404.pdf>> last visited on 25/04/2017

²⁹ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2002) Doc WIPO/GRTKF/IC/3/7.

any of the researches conducted and resulting publications”.³⁰ Costa Rica Biodiversity Law was created to provide compensation for the knowledge, practices and innovations of indigenous peoples and local communities.³¹ Other *sui generis* national legislation include the African Model Law, the Indian Biodiversity Act, the Peruvian *sui generis* law No 27,811 (2002) and the Pacific Model Law (2002).

In general, WIPO recognises fifteen key elements to *sui generis* legislation that should be achieved through the implementation of such laws:³²

- (1) What the policy objectives of the *sui generis* are;
- (2) The reasons why the subject matter should be protected by a *sui generis* system;
- (3) Under which conditions TK should be accessed;
- (4) Which circumstances should require the protection of TK;
- (5) How broad the scope of rights should be;
- (6) Who the right holder should be and why;
- (7) How such right should be acquired;
- (8) Expiration date and reasons why the right can be lost;
- (9) Sanctions and enforcement of the right;
- (10) Registration mechanisms and other procedures for the acquisition and

³⁰ Similar provisions were introduced in Samoa, Venezuela, Peru, India, Vietnam, Bolivia, Costa Rica and Brazil. See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2002) Doc WIPO/GRTKF/IC/3/7.

³¹ See Costa Rica Biodiversity Law No 7788 electronic document <www.wipo.int/wipolex/en/text.jsp?file_id=208691> last visited on 4/03/2017

³² “In the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2003) Doc WIPO/GRTKF/IC/5/INF/4 it is specified that: ‘the *sui generis* measures and laws analysed in this document constitute a wide range of policy choices made by the countries with regard to the legal protection of TK. Since the information provided in Part 2 of the Annex is highly detailed and may not display the fundamental policy approaches of these measures in a simple format, Part 1 of the Annex summarizes the basic policy approaches which were taken by the national measures. These choices, and the considerations underlying them, are reflected in the Summary Table of Part 1 by describing the following aspects of the respective measures: (a) most *sui generis* measures for TK combine two basic legal concepts to govern the use of TK: (1) the regulation of access to TK, and (2) the grant of exclusive rights for TK. This combination reflects the two major legal frameworks within which most measures are adopted and implemented: intellectual property frameworks and access and benefit-sharing arrangements. In many cases, access regulation for TK is part of larger access and benefit-sharing frameworks which apply also to genetic or biological resources. The first row of the Summary Table therefore describes the basic legal and policy frameworks in which the measure was taken, including also, if relevant, unfair competition policy and indigenous rights; (b) *sui generis* measures combine diverse conceptual and policy tools to customize legal protection for TK. These conceptual and policy tools include (1) the regulation of access to TK, (2) the grant of exclusive rights for TK, (3) concepts from the law on the repression of unfair competition and (4) references to customary laws of indigenous and local communities. The second row of the Summary Table thus describes these basic legal and policy tools that were utilized in the various laws and measures” see WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2003) Doc WIPO/GRTKF/IC/5/INF/4 at 1 and 3.

maintenance of rights;

(11) Regulations defining the access and benefit-sharing of TK (Mutually agreed terms and prior informed consent);

(12) Introduction of defensive protection;

(13) The introduction of regional and international protection, including the problem of so-called “Regional Traditional Knowledge”;

(14) The creation of institutional arrangements where the policies, systems, and processes that *sui generis* law use to legislate, plan and manage their activities efficiently; and

(15) Recognition of customary laws and protocols of indigenous peoples.

And yet, though the list above seems exhaustive, WIPO recognises the inherent difficulty in creating effective *sui generis* legislation protecting TK and in those countries implementing such laws or thinking of creating *sui generis* laws WIPO asks how such law:

... defines/identifies the policy objective of the protection; identifies the subject matter; identifies the criteria the subject matter must meet as a condition for protection; identifies the owner; defines the rights conferred on the owner and the exceptions; establishes the procedures and formalities for acquisition and maintenance of the rights conferred; enforces the rights: i.e. effectively permits action where there is an infringement of the rights conferred; defines how the rights are lost or expire; and interacts with, overlaps or complements existing IP standards.³³

In fact, WIPO is today aware that there are effective problems in implementing a *sui generis* system. They include “the diversity of the subject matter, identifying the owner of the rights, procedures and formalities for the acquisition and

³³ International Intellectual Property Institute (IPI) “Is a Sui Generis System Necessary?” (2004) electronic document <<http://iipi.org/wp-content/uploads/2010/07/NewYork011404.pdf>> last visited on 25/04/2017; see also WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore “Comparative Summary of *Sui Generis* Legislation for the Protection of Traditional Cultural Expressions” (Génève, 2003) Doc WIPO/GTRKF/IC/5/INF/3.

maintenance of the rights conferred, and time limits conferred on the right”.³⁴
 Consequently, in considering indigenous TK and *sui generis* laws, WIPO admits:

- Problems in identifying the owner of the right are obvious and go to the idea of community and shared knowledge
- Many communities might have problems meeting formal requirements to acquire and maintain rights.
- ... in a strict sense TK is not a temporary concept. ... *sui generis* legislation makes a clear distinction between the TK and an invention stemming from its use. Therefore what is in the public domain is the invention and the patent is granted or expires on that invention not the traditional knowledge. But TK and the products invention stemming from it are sometimes indistinguishable, thus this neat distinction does not always apply.
- ... [There might] be considerable overlap with existing IP laws. This leads to confusion for litigants, uncertainty in the law and if it is possible to rely on the provisions of an existing law, it is undesirable and unnecessary to create another law.
- Insofar as a *sui generis* system might add constraints to existing laws, for example, the Patent law of a country, this might make the law inconsistent with International Agreements such as TRIPS.
- Where breach of a contract will result in similar sanctions being imposed by a court that might be prescribed by a *sui generis* law, why create the law?³⁵

While framing the limitations of *sui generis* legislation, WIPO, on the other hand, recognises the importance to develop suggestions for “the adoption of international standards that, by undertaking a harmonized approach, could enhance international protection, avoid free riding and misappropriation, and reduce distortions and impediments to international trade of products and

³⁴ At 3.

³⁵ Supra at 3-4.

services incorporating traditional knowledge. Equally, development of, and experience with, non-binding guidelines or recommendations to guide national systems may lead to a greater sharpening of understanding of the essential elements of a successful, workable and effective national system, that may in turn feed into the identification of international standards”.³⁶ In considering *sui generis* laws WIPO instructed that the development of national policies on TK and TCEs would require that the following question should be answered:

- What TK and TCEs should be protected? What form and characteristics do TK and TCEs have?
- What objectives are sought to be achieved through according IP protection?
- Who should benefit from any such protection or who holds the rights to protectable TK/TCEs?
- What forms of behavior in relation to the protectable TK/TCEs should be considered unacceptable/illegal?
- How can the existing IP system be used to protect TK and TCE-related interests?
- Are there gaps in the protection available, and if so, could those gaps be filled by adapting the existing IP framework, or would TK and TCEs be better protected by a distinct *sui generis* system?
- For how long should protection be accorded? • Should there be any formalities?
- Should there be any exceptions or limitations to rights attaching to protectable TK/TCEs?
- What sanctions or penalties should apply to behavior or acts considered unacceptable/illegal?
- Should newly recognized rights in TK and TCEs have retrospective effect?
- How should foreign rights holders/ beneficiaries be treated?³⁷

³⁶ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore “Elements of a Sui Generis System for the Protection of Traditional Knowledge (Genève, 2002) Doc WIPO/GRTKF/IC/3/8.

³⁷ WIPO “Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions” (2015) at 37
 electronic document <www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf> last visited on 25/04/2017

Certainly, the creation of *sui generis* laws to safeguard indigenous cultures is an effective way to fill the gaps that current international and national IP laws present when addressing indigenous claims related to sacred and secret knowledge; and yet, even if the idea of creating *sui generis* legislation is conceptually and ethically fair, however, every *sui generis* law created by a country can only work within its borders and have no extended legal enforceability in other countries that do not recognize the same rights. And, as we all know too well, most of the cultural piracy taking place today happens within the borders of developed countries like the United States, which so far have shown no interest in creating legislation that would favour indigenous peoples' economic and cultural rights. As will become evident in the next chapter, the same geographical limitation applies to the Archives and Libraries that today collect indigenous culture and knowledge. While WIPO suggests that Collections and Archives can protect indigenous art, and work as *prior art*, proving that the production of a certain tangible object copied or stolen from indigenous peoples is not new per se, however, the protection of indigenous cultures remains fundamentally limited to its fixability and to the country that collects the knowledge. In addition to that, the idea of recording the knowledge finds little applicability to the intangible, sacred and secret heritage of indigenous peoples. The next chapter will expand and complete this brief introduction of the world of intellectual property and explain why, as of today, indigenous secret knowledge and the role played by the guardians in safeguarding it cannot be protected effectively by IP laws.

Chapter 9

IP Laws and the Protection of Guardianship and Intangible Sacred Knowledge: An Important Work in Progress

In its complex significance, TK includes tangible knowledge, traditional ecologic and medicinal knowledge - the information indigenous peoples have gathered over the centuries of a close relationship with the environment and its resources – and the intangible forces that are inherently present in such healing remedies (intangible knowledge), including the protocols used for their prescription and utilization. The connection to land is essential in indigenous societies because land is the place where the ancestors rest and are reunited with Mother Earth; whereas Earth is perceived as a living being “whose activity radiates and respond to human activity, so that all life could exist in harmony”.¹ In Dutfield’s words, indigenous ecologic knowledge, TK and TCEs today play an important role in the global economy.² As such:

Traditional peoples and communities are responsible for the discovery, development, and preservation of a tremendous range of medicinal plants, health-giving herbal formulations, and agricultural and forest products that are traded internationally and generate considerable economic value.³

In addition to that, indigenous peoples depended so much on the natural world because they had no scientific tools to develop other forms of knowledge that could help them maintain the well being of the community. The natural world held all the resources that indigenous peoples thought necessary and the

¹ For further information see Julian Kunnie “The Future of Our World” in Jennifer IM Reid (ed) *Religion and Global Culture* (Lexington Books, Oxford and New York, 2004).

² “But accurately estimating the full value of TK in monetary terms is impossible, because TK is often an essential component in the development of other products and because most TK-derived products never enter modern markets” see UN Conference on Trade and Development, Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices: Background Note by the UNCTAD Secretariat, Agenda Item 3, at 6 see UN Doc TD/B/COM.1/EM.13/2 (2000) electronic document <www.unctad.org/trade_env/index.htm> last visited on 02/01/2013.

³ Graham Dutfield “TRIPS-related Aspects of Traditional Knowledge” (2001) 33 *Case Western Reserve Journal of International Law* electronic document <www.academia.edu/860241/TRIPS-related_Aspects_of_Traditional_Knowledge> last visited on 02/01/2013.

“principle of walking in step with the natural world”⁴ is still today fundamental in many indigenous societies. The closeness with nature and the respect of its rhythms however, has nothing to do with the romanticized idea of indigenous societies “devoid of conflict and contradiction”.⁵ It just means that over time, indigenous peoples have developed a set of useful information on how to use natural compounds to cure many illnesses. Since such knowledge is the result of centuries of attempts and experiments, it is incredibly valuable for the community and, often unfortunately, for the world at large which, today, is trying to take a shortcut in empirical knowledge by stealing and commodifying indigenous knowledge for the market. According to Kunnie,⁶ today the 25% of the world’s medicinal products derive from “traditional indigenous forests” and the “thousands of herbs, leaves, roots, and plants that served as medicinal cures for indigenous peoples for millennia are now being expropriated, essentially stolen, by the large Western biotech and pharmaceutical corporations - all for maximal profit”. Indeed, it would take years of frustrating experimentation in laboratories to reach the same level of herbal and medicinal knowledge that indigenous peoples hold. Some valuable TK may in fact survive only in the secrecy and limitation of its transmission. Holders of knowledge might succeed in safeguarding the disclosure of their knowledge by resorting to unfair competition laws, which do not require prior registration or other legal formalities. According to Correa,⁷ in fact, “most laws require, as a condition for protection, that the person in control of the information adopt the steps necessary, under the relevant circumstances, to keep the information confidential”⁸.

The present chapter will analyse in more detail IP laws and how indigenous peoples can use the system in place to safeguard their culture. This chapter will

⁴ Julian Kunnie “The Future of Our World” in Jennifer IM Reid (ed) *Religion and Global Culture* (Lexington Books, Oxford and New York, 2004) at 131.

⁵ “Like all of the human community, Indigenous peoples’ cultures were and are fraught with pain and conflict as they struggle to shape sociocultural environments and live in increasingly complex societies” supra at 131.

⁶ Kunnie at 139.

⁷ Carlos M Correa “Traditional Knowledge and Intellectual Property” (The Quaker United Nations Office (QUNO), Genève, 2001).

⁸ Correa at 12.

address the intangible sacred knowledge held by the guardians and the tangible aspects of it. Indigenous culture and TK is a stratified system of interrelated knowledge and information that does not always need to remain secret. Some aspects of the secret intangible information, in fact, can be shared with the public. In that case, IP laws can be of some help. This chapter will start discussing the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) as the complex system of high minimum standards of intellectual property rights that apply to all member states of the World Trade Organisation. This chapter will also analyse broadly and in more detail the IP provisions that can, in actual fact, protect indigenous knowledge. Unfortunately, most of the arguments will prove that, as of today, IP laws are still unsuitable solutions to the preservation of indigenous intangible cultures and especially their sacred/secret knowledge.

9.1 - The TRIPS Agreement: The High Minimum Standards That Govern the World and the Indigenous Guardians of Intangible Knowledge

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) was introduced and administered by the World Trade Organization (WTO) as an international agreement that sets high minimum standards for most of the existing forms of intellectual property regulations as applied to WTO member states. It was introduced in 1994 at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). The TRIPS Agreement incorporates most, but not all, the provisions discussed by the Berne and Paris Conventions and goes beyond the scope of those two Conventions by establishing higher and more specific norms safeguarding IP. It addresses seven categories of intellectual property: copyright and related rights (copyright rights, covering content producers including performers, producers of sound recordings and broadcasting organizations), patents, trademarks and service marks, geographical indications, undisclosed information or trade secrets, new plant varieties, industrial designs and layout designs of integrated circuits, appellations

of origin.⁹ The Agreement sets the minimum standards by requiring member states to comply with the provisions of the newest versions of the Paris Convention and the Berne Convention. When considering the TRIPS Agreement, the fundamental question to be asked is: does the Agreement ‘adequately’ protect indigenous peoples’ TK and TCEs, especially the intangible aspect of them?

Though there is today consensus within WIPO and in the TRIPS Council that the Agreement should be revised to include specific regulations tailor-made to safeguard indigenous cultures and the resources in their custody, such expectations have so far brought little visible results.¹⁰ Much of TK and indigenous culture is, in fact, too old or already in the public domain and does not qualify for traditional IP protection. Most of it is intangible and sacred. In addition to that, and in most cases, the author or inventor is not identifiable, which means that no ‘rights holder’ can claim property rights over the intellectual property. In other cases, the claimed rights reside in the custodian of the knowledge who acts as guardian of both the knowledge and the product of the knowledge. Traditional intellectual property law does not address the rights of the guardians of knowledge. Broadly speaking, the system created by the TRIPS recognises a level of protection of information of commercial use only ‘after’ the knowledge has been brought to the public, which is what the

⁹ “High Minimum Standards - In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries. The relevant provisions are to be found in Articles 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris Convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus agreement” see World Trade Organization <www.wto.org/english/tratop_e/trips_e/intel2_e.htm> last visited on 16/02/2015.

¹⁰ See electronic documents at <<https://tkbulletin.wordpress.com/category/2-international-organisations/trips/>> last visited on 15/07/2015; see also WIPO “Intellectual Property and Sustainable Development: Documentation and Registration of Traditional Knowledge and Traditional Cultural Expressions” (2011) Doc WIPO/TK/MCT/11/INF/7.

customary laws of indigenous societies prevent the TK holders and guardians to do. In the eyes of developing countries,¹¹ the TRIPS promotes the piracy of indigenous TK and TCEs. Many of the developing countries are firmly aware that, at this moment in time, and with the IPR laws currently circulating in the world, it is impossible to defeat piracy and misappropriation. That is why, according to Dutfield,¹² developing countries are seeking to create new standards of IP laws to be inserted within the TRIPS Agreement which would give harmonization of meaning and intent to the international system of IP laws. The idea that TRIPS does not benefit developing countries' interests is not new to the table of negotiations.¹³ Though the nature of TRIPS indeed reflects the one of any multilateral treaty, it unfortunately also reflects the longstanding global power hierarchies today present in the world. As explained by Arewa,¹⁴ "such hierarchies are in large part a consequence of historical patterns of relationship, particularly hierarchies of culture and power". In other words, developed countries are advantaged by the TRIPS more than developing countries. The general feeling is that, in order to safeguard the rights of traditional communities living within their borders, developing countries might need to get concessions from developed countries. In this regard, the TRIPS Agreement requires that WTO member States incorporate high minimum standards of intellectual property protection into their domestic laws. As explained by Reichman in his articles:¹⁵

¹¹ See the list of developing countries electronic document <www.isi-web.org/component/content/article/5-root/root/81-developing> last visited on 15/07/2015.

¹² Graham Dutfield "TRIPS-related Aspects of Traditional Knowledge" (2001) 33 *Case Western Reserve Journal of International Law* electronic document <www.academia.edu/860241/TRIPS-related_Aspects_of_Traditional_Knowledge> last visited on 26/12/2012.

¹³ Dutfield *supra*.

¹⁴ "Hierarchies of culture reflect nineteenth century evolutionary assumptions about the relative status of different cultures. As a result of such hierarchies, a relative ranking of cultures became predominant in the nineteenth century. These evolutionary rankings assumed that all societies moved through an identical progression from 'savagery' to 'barbarism' to 'civilization', and that European countries represented "civilization", or the apex of these rankings. Most current Third World countries were ranked on the lower rungs of this evolutionary ladder by those at the top. ... Such hierarchies became a justification for political domination and suppression. As a result of the global political structures that emerged in then nineteenth century based on colonialism, for example, those who lived in cultures that were deemed less advanced were often denied the opportunity to participate in the negotiations of accords and agreements that directly concerned them" see Olufunmilayo B Arewa "TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks" (2006) 10 2 *Marquette Intellectual Property Law Review* 156 at 159.

¹⁵ Jerome H Reichman "The TRIPS Agreement Comes of Ages: Conflict or Cooperation with the Developing Countries?" (2000) 2 *Case Western Reserve Journal of International Law* 441 at 442 electronic document <http://scholarship.law.duke.edu/faculty_scholarship/463/> last visited on 02/01/2013.

... the international minimum standards of intellectual property protection set out in the TRIPS Agreement will eventually determine the level of competition for knowledge goods that are sold or licensed on the global market that emerged from the Agreement Establishing the World Trade Organization.

Even if the TRIPS Agreement is based on the Paris and Berne Conventions, it strategically prefers to set high international minimum standards that would be achievable by every country.¹⁶ Though the list of such standards is quite thorough, it does not contain preferential or differential measures for developing countries and leaves to states to implement the standards within their borders. In this case, as clearly explained by Reichman,¹⁷ the “costs of building and staffing intellectual property systems, including patent offices and other administrative agencies, constitute a palpable drain on very scarce resources” which, added to the expense to send delegations to the WTO, WIPO and other bodies’ meetings, could hinder the capacity of states to effectively benefit from TRIPS provisions or participating in their discussion and modification. In this case, and given the fact that many indigenous peoples live in developing countries, the influence that representatives from developing countries could have in the discussion of topics that directly affect them could be watered down to insignificant non-effecting levels. Article 1.1 of the TRIPS¹⁸ explains that states shall give effect to the provisions of the Agreement, but they shall “be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”.¹⁹ In other words, it is up to states to decide when and how to implement the standards of the TRIPS in

¹⁶ TRIPS Agreement “imposed a comprehensive set of relatively high international minimum standards governing copyrighted literary and artistic works (including computer programs), rights related to copyright law (including sound recordings), patents, trademarks, geographical indications of origin, trade secrets, industrial designs, integrated circuits designs and even (indirectly) unfair competition. It does not cover competition law, as such, although it touches on related issues, especially licensing agreements” see Reichman at 443.

¹⁷ At 450.

¹⁸ “Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”.

¹⁹ For further information see Jerome H Reichman “The TRIPS Agreement Comes of Ages: Conflict or Cooperation with the Developing Countries?” at 446.

their national legislation. In the case of undisclosed information, states could expand and interpret the regulation in ways that could provide broader protection for sensitive information held by indigenous peoples (this will be discussed more thoroughly in the final chapter). This means that states which are really keen to safeguard indigenous knowledge might expand the minimum standard of TRIPS to include indigenous interests. However, what happens in the case of states that have no actual interest in modifying their national legislation to expand TRIPS international high minimum standards to a level that is more suitable for indigenous holders of knowledge?

According to Dutfield, the fact that there is no mention of indigenous TK in the TRIPS does not prevent states from enacting legislation to protect such category of knowledge.²⁰ In theory the TRIPS Agreement establishes minimum standards²¹ for at least six categories of intellectual property that are relevant to the protection of TK and TCEs:

- Copyrights and Related rights (Section 1);
- Industrial designs (Section 4);
- Patents (Section 5);
- Undisclosed information (Section 7);
- Trademarks (Section 2); and
- Geographical indication (Section 3);

It is generally known that copyrights and related rights, patents, trademarks and geographical indications provide little protection to the knowledge in the custody of indigenous guardians. The requirements for application under TRIPS, in fact, are subjected to the Paris Convention (1967) and the Berne Convention (1971). Both Conventions do not include indigenous peoples in their discourse and in doing so, they set standards that are impossible to be respected by

²⁰ Graham Dutfield "TRIPS-related Aspects of Traditional Knowledge" (2001) 33 *Case Western Reserve Journal of International Law* electronic document <www.academia.edu/860241/TRIPS-related_Aspects_of_Traditional_Knowledge> last visited on 26/12/2012.

²¹ In the words of Reichman the TRIPS Agreement imposes "a comprehensive set of relatively high international minimum standards governing copyrighted literary and artistic works (including computer programs), rights related to copyright law (including sound recordings), patents, trademarks, geographical indications of origin, trade secrets, industrial designs, integrated circuit designs and even (indirectly) unfair competition. It does not cover competition law, as such, although it touches on related issues, especially licensing agreements" see Reichman at 441-470.

indigenous peoples for the simple reason that, in indigenous societies, culture evolves and is transmitted in ways that are often totally different from the Western ones (see chapters 2 and 6).

9.1.1 - Patent Law

The elements of patents' early history that we have inherited today include:

- the patent system as a mechanism to encourage innovation;
- the notion of social contract between state and patentee, with corresponding obligations on both sides;
- the centrality of monopoly to the regulation of that contract;
- the desire for a balance of interests as between society and the patentee; and
- the idea that the monopoly should rightly go to the inventor of the new creation.²²

As such, patents grant monopoly and property rights over inventions. They are granted for new, useful and non-obvious inventions for a period of 20 years from the filing date of a patent application. Art 27.1 of the TRIPS Agreement recognises as patentable subject matter:

... patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. ... patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

The applicability of patent law is clearly limited to those innovations that are new, non-obvious and capable of industrial application. The monopoly granted by patent law is strictly economic and limited in time.

²² Hector MacQueen, Charlotte Waelde and others *Contemporary Intellectual Property* (Oxford University Press, London and New York, 2011) at 373.

In the case of indigenous peoples, words like ‘inventive step’, ‘new’, capable of industrial application’, ‘non-obvious’ and ‘useful’ are unlikely to be applicable to indigenous culture. On the same line, patentability requires that the information is disclosed during the application process. This means that indigenous ecologic secret knowledge transmitted orally and over long periods of time will unlikely benefit from patent law protection. Article 29.1 of the TRIPS Agreement requires that applicants disclose sufficient and clear information about the invention so that someone else “skilled in the art” might reproduce the product or complete the process.²³ The approach is clearly focused on the profitability of the invention, and gives little space to any holistic alternative approach. This means that the knowledge attached to traditional remedies and related knowledge must be put out there to be reproduced by others without benefit sharing or prior informed consent. Someone once said “knowledge itself is power”.²⁴ Disclosing knowledge not only gives others the power embodied in the knowledge, but also the resources to make a personal profit out of the knowledge that belonged to indigenous peoples. On the other hand, Art 27.2 allows states to:

... exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect the *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

However, the Agreement does not define what constitute “*ordre public* and morality”, and to give states the flexibility to decide the parameters can be potentially risky.²⁵ Article 27.3(b) of the TRIPS, on the other hand, follows the European Patent System of 1973 and, inter alia, encourages member states to “provide for the protection of plant varieties either by patents or by an effective

²³ Art 1: “Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application”.

²⁴ Sir Francis Bacon *Meditationes Sacrae* (1597).

²⁵ For further information see John Mugabe “Intellectual Property Protection and Traditional Knowledge” at <www.wipo.int/tk/en/hr/paneldiscussion/papers/word/mugabe.doc> last visited on 15/05/2013.

sui generis system or by any combination thereof". This means that member states must generally provide reasonable patent or *sui generis* protection for microorganisms and for "nonbiological and microbiological processes" but not for all life forms. The fact that much is left to states on how to guarantee the safeguarding of the life forms present in their soil is, however, risky and counterproductive. Not only might states decide not to implement regulations safeguarding indigenous peoples' social and cultural rights but, as it is explained in the Intellectual Property Rights and Human Rights Sub-Commission on Human Rights - Resolution 2000/7:²⁶

... actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to, inter alia, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food of plant variety rights and the patenting of genetically modified organisms, "bio-piracy" and the reduction of communities' (especially indigenous communities') control over their own genetic and natural resources and cultural values, and restrictions on access to patented pharmaceuticals and the implications for the enjoyment of the right to health.

In other words, the TRIPS Agreement sets standards that, while reflective of international and national IPR laws built on the model of the Berne and Paris Conventions, are not in line with fundamental human rights standards as expressed in the UDHR (Art 27.2) as well as ILO Convention 169, UNDRIP, ICESCR and ICCPR, which guarantee the rights to life, to property, to the enjoyment of one's own cultural life, the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination. The Resolution explains that:²⁷

²⁶ Office for The High Commissioner for Human Rights, Intellectual Property Rights and Human Rights Sub-Commission on Human Rights - Resolution 2000/7 electronic document <www.aaas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/E-CN_4-SUB_2-RES-2000-7_Eng.pdf> last visited on 16/02/2015.

²⁷ "Requests Governments to integrate into their national and local legislations and policies, provisions, in accordance with international human rights obligations and principles, that protect the social function of intellectual property", 'Requests intergovernmental organizations to integrate into their policies, practices and operations, provisions, in accordance with international human rights obligations and principles, that protect the social function of intellectual property'; "Calls upon States parties to the International Covenant

... since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other hand. Consequently, states should give primacy of human rights obligations over economic policies and agreements.

This means that the set of rights recognised to belong to indigenous peoples are not respected under TRIPS. Which includes the above and what today is believed to form the cultural rights of indigenous and non-indigenous peoples. On a practical level, when analysing the scope of Art 27.3 (b) of the TRIPS Agreement on plant varieties, Mugabe explains that the terms “effective *sui generis* system” used in the article are essentially controversial.²⁸ First, there is no definition of ‘effectiveness’, which means that any state can argue in favour of their national system on the basis of the interpretation it gives to the word ‘effectiveness’; second, too much decision making is left in the hands of national legislation, which means that, in the case states are not keen to implement ‘effective’ *sui generis* legislation, there is not much that can be done to address the problem. On the other hand, as Mugabe explains, the open interpretation of the term ‘effective *sui generis* system’ allows developing countries to engage in “devising and promoting non-patent measures” that would safeguard indigenous peoples’ knowledge.²⁹ Unfortunately, national legislation can only prevent a patent’s application within the borders of the state. They have no say in case the patent is issued within the territorial borders of a state different from the one that originated the knowledge.

on Economic, Social and Cultural Rights to fulfil the duty under article 2, paragraph 1, article 11, paragraph 2, and article 15, paragraph 4, to cooperate internationally in order to realize the legal obligations under the Covenant, including in the context of international intellectual property regimes” (para 5,6 and 7) electronic document<www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument> last visited on 02/01/2013.

²⁸ See John Mugabe “Intellectual Property Protection and Traditional Knowledge” electronic document <www.oapi.wipo.net/export/sites/www/tk/en/hr/.../pdf/mugabe.pdf> last visited on 26/12/2012.

²⁹ See Mugabe.

9.1.2 - Copyright Law

In general, Copyright law protects:³⁰

- literary works such as novels, poems, plays, reference works, newspaper articles;
- computer programs, databases;
- films, musical compositions, and choreography;
- artistic works such as paintings, drawings, photographs, and sculpture; and
- architecture; and advertisements, maps, and technical drawings.

The artistic works must be original and fixed.³¹ According to WIPO:³²

The expression copyright refers to the main act which, in respect of literary and artistic creations, may be made only by the author or with his authorization. That act is the making of copies of the work. The expression author's rights refers to the creator of the artistic work, its author. It thus underlines the fact, recognized in most laws, that the author has certain specific rights in his creation which only he can exercise.

Article 9 of the TRIPS Agreement, which deals with Copyright not only requests full compliance with "Article 1 through 21 of the Berne Convention (1971) and

³⁰ See WIPO at <www.wipo.int/copyright/en/> last visited on 13/07/2015; and WIPO at <www.wipo.int/edocs/pubdocs/en/intproperty/909/wipo_pub_909.pdf> last visited on 13/07/2015.

³¹ Article 2 of the Berne Convention states that: "(1) The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. (2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form. (3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work. (4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts. (5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections".

³² See WIPO electronic document <www.wipo.int/edocs/pubdocs/en/intproperty/909/wipo_pub_909.pdf> last visited on 13/07/2015.

the Appendix thereto”, but guarantees protection to “expressions and not to ideas, procedures, methods of operation or mathematical concepts as such”.

As seen before, most of indigenous culture is important for its intrinsic meaning and not for the economic value it would hold once commodified. As such, nothing that resides in the intangible world can find any protection under Art 9 of the TRIPS Agreement. And, as well described in the present work, most of the intrinsic value of indigenous cultures resides in the intangibility of the idea (sacred/spiritual or not) that inspired the final product. Therefore, the TRIPS Agreement fails to safeguard indigenous cultural rights such as:

- the right to protection of artistic, literary and scientific works;
- the right to develop a culture;
- the right to respect the cultural identity;
- the right of minority peoples to respect for identity, traditions, language, and cultural heritage;
- the right of a people to its own artistic, historical, and cultural wealth; and
- the right of people not to have an alien culture imposed on them.

As Dutfield points out in his articles, the unsuitability of IPR laws and the minimum standards enforced by the TRIPS could be resolved if there was the actual will to do so.³³ The fact that indigenous peoples are often not informed of the discussions and decisions taken at the national and regional level involving their TK and cultural resources is a clear indication of that. Moreover, it prevents indigenous peoples from having any say in the decisions affecting their lives and cannot therefore have any significant impact on the reasoning of the Western law purists who believe that everything should be based on a Western legal

³³ “Given the way copyright has been transformed to, for example, treat computer programs as literary works, it hardly seems radical to extend the definition of copyrightable subject matter to unfixed cultural expressions or even to create a new IPR based on copyright for such an end” ... “However, the most powerful actors in international IPR negotiations are still resistant to the idea of modifying international copyright rules to more effectively protect folklore. And to date, developing country proposals to reform TRIPS to protect TK have paid little attention to copyright” see Graham Dutfield “TRIPS-related Aspects of Traditional Knowledge” (2001) 33 *Case Western Reserve Journal of International Law* electronic document <www.academia.edu/860241/TRIPS-related_Aspects_of_Traditional_Knowledge> last visited on 26/12/2012.

model.³⁴ Copyright law also forces indigenous peoples to count on a legal system that, contrary to their customary laws, does not protect the secrecy and intangibility of the information in the custody of the guardians.

9.1.3 – Undisclosed Information

Concerning secret knowledge and secret information, the only protection guaranteed by the TRIPS Agreement is Article 39, which provides that WTO members must protect undisclosed information and data submitted to governments as a means to “ensure effective protection against unfair competition as provided in Art 10 *bis* of the Paris Convention”.³⁵ Article 39.2 of the TRIPS Agreement states that “natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practice”. So long as such information:

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) has commercial value because it is secret; and
- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Undisclosed information and unfair competition in theory provide the holder of knowledge with some form of protection; however they do not provide the holder of secret information with an exclusive right to the information itself. In

³⁴ As introduced in chapter 5, In fact, and not surprisingly, indigenous peoples are most of the times formally and deliberately excluded from those avenues where issues important to them are discussed (TRIPS included). They have no voice to actually present the real nature of the issue as it is perceived by them, and have no vote power to influence whatsoever the decisions that will ultimately affect their lives and the survival of their tangible and intangible cultures.

³⁵ “Because the Paris Convention did not extend the repression of unfair competition to acts involving unauthorized use of test data in absence of fraud, the language of Article 39 of the TRIPS Agreement seems to indicate that its actual purpose is to expand the examples listed in Article 10 *bis* of the Paris Convention and which illustrate the various modalities of acts of unfair competition that must be repressed” see Nuno Pires de Carvalho *The TRIPS Regime of Antitrust and Undisclosed Information* (Kluwer Law International, The Netherlands, 2008) at 189.

general, they only prevent acts of disclosure, acquisition and use without consent and contrary to honest business practice within a competition environment. Any undisclosed information which holds economic value can be considered trade secrets. While patents cover inventions that are “useful, novel and non-obvious in the light of the existing knowledge”³⁶ (see also Art 27 of the TRIPS Agreement), and copyrights protect original, fixed artistic creations, trade secrets law can cover any useful information seeking protection for unspecified length of time. However, the information seeking protection under trade secret law needs to have actual or potential economic value. The information needs to be inherently ‘technological’ and no individual creator of the trade secret is required neither to file a formal application to be entitled to its protection.³⁷ In addition to that, the secrecy covered by trade secret is not absolute, but relative, and it can therefore protect relatively secret TK and only as long as the information has technological connotation and an economic value. Again, the intangible, sacred aspect of indigenous cultures seems to remain unprotected by the laws of undisclosed information and trade secrets. In a practical way, and given that much of indigenous culture is of old lineage and traditional per se, its reproduction could be blocked by demonstrating that the reproduction is based on a pre-existing idea which is stolen or unlawfully reproduced. As the next section will prove, to claim *prior art* over reproduced knowledge could work to prevent the circulation of the reproduction, but it does not safeguard the sacred/secret idea/knowledge/information that is being disclosed. Secrecy, in fact, exists to prevent any circulation of the knowledge.

³⁶ “An invention must meet several criteria if it is to be eligible for patent protection. These include, most significantly, that the invention must consist of patentable subject matter, the invention must be industrially applicable (useful), it must be new (novel), it must exhibit a sufficient ‘inventive step’ (be non-obvious), and the disclosure of the invention in the patent application must meet certain standards” see WIPO *Intellectual Property Handbook: Policy, Law and Use* (2008) at para 2.6.

³⁷ For further information on the subject see Deepa Varadarajan “A Trade Secret Approach to Protecting Traditional Knowledge” electronic document <www.yjil.org/print/volume-36-issue-2/a-trade-secret-approach-to-protecting-traditional-knowledge> last visited on 11/11/2012.

9.2 - Traditional Knowledge, Archives and *Prior Art*

Over the years, WIPO has tried to bridge the gap that still divides indigenous peoples' TK and IP laws by becoming more aware and inclusive of indigenous peoples' cultural expectations. One of the improvements is the understanding that indigenous peoples' culture is not a commodity and cannot be treated as such. The holders of knowledge are not necessarily the whole indigenous community where the knowledge exists, but rather some selected members of it; the custodian is not necessarily the creator; and the creation might not constitute property but exists outside Western stereotypes. WIPO agrees that, while the idea of 'protection' is a defensive mechanism necessary to guarantee the economic value of a production, when it comes to indigenous peoples, the notion of protection alone is not enough. Indigenous peoples need 'protection' of material (tangible) and non-material (intangible) forms from unauthorized use made by third parties; but they also need the 'preservation/survival' of their cultures. Preservation includes the conservation of the living cultural and social context that created the TK and TCEs so that the complex structure of indigenous societies and customary laws is maintained; as well as the preservation of the spiritual, holistic traditions of the community.³⁸ WIPO's suggestions for the preservation of indigenous knowledge are often unrealistic and unpractical, if not unethical. In order to preserve their culture, and make sure that the preservation process happens without fail, WIPO recommends that indigenous peoples should fix and document their cultures and, what is worse, their sacred and secret knowledge.³⁹ So, first WIPO suggests that the only way to preserve indigenous culture is to maintain the social and traditional structure from which the knowledge originated; then it suggests to dismantle that very same traditional structure by documenting a culture that, more often than not, is profoundly holistic, often sacred, orally transmitted and guarded by few. Again, WIPO unrealistically proposes to preserve the knowledge by bringing it to the

³⁸ See WIPO Practical Workshop for Indigenous Peoples and Local Communities on IP and Traditional Knowledge Doc WIPO/IPTK/GE/14; see Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore at Doc WIPO/GRTKF/IC/23/INF/8.

³⁹ See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève 2007) Doc WIPO/GRTKF/IC/11/9 at 25.

public domain, which is the place where TK and TCEs are today exploited. In addition to that, the idea that third parties would be responsible to preserve indigenous peoples' culture is very challenging. Third parties' unrestricted access to indigenous peoples' TK and TCEs could not only go against the ethical and moral values of the community that originated the knowledge, but the registration by third parties of restricted spiritual information without the authorization of the custodians of the knowledge is ethically and morally wrong regardless of the intention of those who document the culture. The preservation of indigenous knowledge can only be guaranteed if the persons within the community who have traditionally been responsible for its conservation and transmission can manage it. WIPO recognises that the tension related to the preservation of indigenous culture occurs:⁴⁰

... most obviously when preservation is undertaken without the authorization of the traditional owner or custodian. For example, the unauthorized recording of performances of expressions of folklore or the documentation or dissemination without consent of traditional medical knowledge that may be considered confidential or secret;⁴¹ or ... when the process of preservation is undertaken with the consent or involvement of the TK holder, but the TK and TCE is unwittingly or incidentally undermines protection of TK or TCEs - this can occur when material is recorded or documented without full understanding of the implications. Hence the process of preservation can be in tension with the desire to protect TK and TCEs when disclosure, recording or documentation of this material undermines interests and precludes potential IP rights, and may place it in the public domain without the originating community's or TK holder's awareness of or consent to the full implications of preservation.

In other words, WIPO recognises that conflicts can arise any time the holistic culture of indigenous peoples is managed by third parties who might not have the proper resources (cultural, moral, traditional, linguistic etc) to fully understand the culture they are trying to manage.

⁴⁰ See WIPO *supra* at 29.

⁴¹ See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2007) at Doc WIPO/GTRKF/IC/11/9.

In its 2007 report,⁴² WIPO claims again that, in recognition of “its importance as part of the collective cultural heritage of humanity”, indigenous TK and TCEs should be made available to a wider public. The assertion is unequivocal; it means that indigenous peoples should disregard traditional customary laws and bring to that very same public domain that destroyed their culture what is left of their traditions, with the risk to see their TK and TCEs exploited even further.⁴³

The idea proposed by WIPO goes against a series of regulations that recognise indigenous peoples’ right to self-determination and freedom to dispose of their cultures as they so decide.⁴⁴ It is possible that what WIPO is implying is the recognition of profoundly unfair measures that today form part of the international and national intellectual property system that was created to serve the economic needs of the creative and technological production of the Western elite. What WIPO seems to suggest is that the system is well established and functioning and the fact that indigenous voices are today stronger than before, forces states to take unprecedented measures to include indigenous voices into an IP system that was not created to include them. In fact, the system that

⁴² See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2007) see Doc WIPO/GRTKF/IC/11/9 at 25.

⁴³ At page 11 of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2014) it is restated that: “[Member States]/[Contracting Parties] should [endeavour to], subject to and consistent with national and customary law: (a) facilitate/encourage the development national traditional knowledge databases for the defensive protection of traditional knowledge, [including through the prevention of the erroneous grant of patents], and/or for transparency, certainty, conservation purposes and/or transboundary cooperation; (b) [facilitate/encourage, as appropriate, the creation, exchange and dissemination of, and access to, databases of genetic resources and traditional knowledge associated with genetic resources;]” see Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Twenty-Eighth Session, Genève, 2014) at Doc WIPO/GRTKF/IC/28/5.

⁴⁴ Article 13 of the UNDRIP states that “indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons”; Article 31 is very clear about indigenous rights over their culture by stating that “indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions”; Article 3 of ILO 169 recommend states that “Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination” whereas Article 7.1 recognizes that indigenous peoples “shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development”; Article 8 of ILO 169 recommends states “in applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws” and “these peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights”.

should accommodate indigenous claims is ill suited to discuss them or to resolve the disputes involving indigenous peoples TK and TCEs.

It is today widely suggested that the creation of digital libraries and national archives could safeguard indigenous peoples' cultures preserving them from disappearance and, at the same time, work as 'prior art'. The idea of creating digital libraries documenting TK and TCEs would, in fact, help indigenous peoples to prove that the art being exploited by outsiders constitutes *prior art*.⁴⁵ This would eventually defeat any attempt to patent or copyright indigenous knowledge by proving that novelty on the disclosed information has no legal basis. Patent law indeed requires that the invention presents an innovative step, with a level of novelty⁴⁶ and industrial applicability,⁴⁷ and the proof of the pre-existence of the information included in the invention can hinder its patentability and the monopoly it grants. The famous Turmeric (United States Patent No. 5,401,504) and Ayahuasca (*Banisteriopsis Caapi*, United States Plant Patent No 5,751) cases, among others, are two very famous examples in which the patent system was stretched to its limits and "failures in the prior art search and examination process paved the way to questionable patents being granted".⁴⁸ The only reason why the patents were revoked is because there was vast documentation attesting to the existence of such compounds and their healing

⁴⁵ "An invention is new if it is not anticipated by the prior art. 'Prior art' is, in general, all the knowledge that existed prior to the relevant filing or priority date of a patent application, whether it existed by way of written or oral disclosure. The question of what should constitute 'prior art' at a given time is one which has been the subject of some debate" see WIPO *Intellectual Property Handbook* (2004) at para 2.15; The Patent Regulation Treaty defines prior art as "relevant prior art shall consist of everything which has been made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) and which is capable of being of assistance in determining that the claimed invention is or is not new and that it does or does not involve an inventive step (i.e., that it is or is not obvious), provided that the making available to the public occurred prior to the international filing date" see Rule 33 (a).

⁴⁶ "It should be noted that novelty in patent law means little more than that the claimed invention is not disclosed in the 'prior art'. What counts as prior art and how novelty and non-obviousness are defined in various patent systems around the world is highly variable. In some regimes, patent protection has been granted for elements of TK, or innovations based on TK. In cases where the patents have been sought by third parties without the prior consent and involvement of TK holders, there has been considerable controversy" see Charles McManis and Yolanda Teran "Trends and Scenarios in the Legal protection of Traditional Knowledge" in Tzen Wong and Graham Dutfield (eds) *Intellectual Property and Human Development* (Cambridge University Press, Cambridge, 2012) at 150.

⁴⁷ Art 27.1 TRIPS Agreement states that: "Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced".

⁴⁸ See Manuel Ruiz *The International Debate on Traditional Knowledge as Prior Art in the Patent System: Issues and Options for Developing Countries* (Center for International Environmental Law – CIEL, 2002) at 1.

properties. The documentation submitted by indigenous peoples worked as prior art and invalidated the claim that the remedy was new and involved an inventive step. What happens in cases when such documentation does not exist? What happens in the case of knowledge that is not recorded because it is too sacred to be fixed in material form?

Indeed, there is today a general trend, especially at the national level, to push to consider 'ecological' knowledge held by custodians as part of the national public domain in total disregard of what indigenous custodians of knowledge may think. The assumption is, in fact, pushed through without the formal consent of the custodians of the knowledge. Unquestionably, the discourse has no reasonable groundings; indigenous peoples developed their ecological knowledge over centuries of attempts and tests on their own skin, often with very harmful results. Theirs is the development of compounds that work in synergy with other compounds to heal the human body and soul. Theirs are the steps that were taken to the acquisition of the knowledge; theirs the restrictions they put into place to safeguard the knowledge and its usage. Western societies pretend to arrive centuries later and claim a knowledge they never helped to create, on the sole basis that they have the power and resources to do so and society at large might benefit from the mass distribution of the compound. From a logical and moral point of view, the argument does not make any sense. The fact that Western societies' tailor-made laws enforcing the total illogicality of such presumptions indicates the protraction of a moral and economic monopoly that would always defeat indigenous claims. According to the Human Development Report 2004: Cultural Liberty in Today's Diverse World published by the UNDP (United Nations Development Program),⁴⁹ misappropriation of TK and TCEs does not need to be deliberate in order to be seriously harmful for indigenous communities. In many cases:

... it arises from mistakenly treating traditional knowledge as part of the public domain, where intellectual property protection does not apply. Traditional knowledge, because it is known publicly within the community (and sometimes

⁴⁹ The Human Development Report 2004: Cultural Liberty in Today's Diverse World electronic document <<http://hdr.undp.org/en/content/human-development-report-2004>> last visited on 27/11/2012.

outside it), is more prone to appropriation without compensation to the community that developed it than are other types of intellectual property.⁵⁰

Even if indigenous peoples were actually keen to share the knowledge in their custody that is not sacred and secret, this would implicate their management of the knowledge, the prior informed consent in the utilisation of the knowledge and the benefit sharing once the knowledge acquires value in the general marketplace. It would also imply that some of the more sensible cultural information must remain secret and shared only by very few within the indigenous community. In addition to that, community management of resources and TK might vary greatly among communities of the same areas, and they might as well consider the concept and usage of 'property rights' forming Western IP laws as totally inapplicable and inadequate to their TK and TCEs to the point that, in some cases, custodians of knowledge have "actively pursued enforcement of their customary entitlements against third parties dealing with these artefacts allegedly without their consent".⁵¹ While Western societies limit their interest in the production of goods, linking profitability to the speed of the mass production, for indigenous peoples the TCE is the cultural result of transmitted and evolving crafting skills imbued with traditional knowledge and holistic forces. The fixation of a design might pass through a complex array of approvals by elders and custodians whose duty is to control the correct usage of the intangible information embodied in the design. When Western societies suggest that the fixation and storage of sensible indigenous information would be useful to hinder the granting of patent and copyright rights over TK, traditional ecologic knowledge and TCEs, they purposefully ignore the fact that, in order to do so, indigenous peoples should put the knowledge in the hands of strangers, where the utilisation, the prior informed consent and the benefit sharing are not necessarily guaranteed, as well as the respect for the intangible spiritual information encoded in the design. Such an action could also be in total breach of the sacred customs of the community and the customary laws that

⁵⁰ UNDP The Human Development Report 2004: Cultural Liberty in Today's Diverse World (2005).

⁵¹ See Haidy Geismar "Copyright in Context: Carvings, Carvers, and Commodities in Vanuatu" (2005) 5 1 *Journal of Social Archaeology* at 25-51.

protect it.⁵² In addition to that, most of the legal books limit TK to a generalized corpus of ecological information, whereas TK is a rather more complex phenomena sometimes known by very few within the community and carefully guarded (see Chapter 3); or it can be an ensemble of information shared within the community or with neighbouring communities living in the same area and using the same natural remedies.⁵³ Therefore, the disclosure of sensitive information, be it in medicines, crafts, art, dances, songs or any other intangible information contained in the tangible, would have the same result of undermining the cultural identity and survival of a community whose sustenance and traditionality depends on the expressions of its culture.

The UNDP Human Development Report recognises the importance to respect the different cultures that inhabit the world without imposing asymmetric power so that some cultures do not impose on others,⁵⁴ and stresses that “the traditional knowledge of indigenous groups has attributes of communal ownership and sometimes has spiritual significance. Intellectual property regimes fail to recognize either the community ownership or spiritual significance of traditional knowledge”.⁵⁵ WIPO and members states have identified several ways to improve the status of TK as prior art such as, inter alia, measures for:

- (1) the classification of traditional knowledge documentation in patent documents and non-patent literature, in particular through the International Patent Classification;

⁵² Referring to indigenous customs, Article 23 of ILO 169 affirms that “handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognized as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted”.

⁵³ “TK is diverse in its nature, and is often an integral part of the life, laws, customs and culture of the communities that develop and maintain it. For some communities, illegitimate use of their TK is offensive or disturbing, and this includes the grant of patents that improperly include TK within their scope. TK is frequently the result of distinct and valuable knowledge systems and the intellectual development, often with a strong empirical and practical element, and is considered by many to have practical and technological value, as well as having broader cultural value and significance for the communities that develop, preserve and maintain TK through traditional mechanisms” see WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2006) Doc WIPO/GTRKF/IC/9/8 at para 2.

⁵⁴ “The unequal economic and political powers of countries, industries and corporations cause some cultures to spread, others to wither” see UNDP The Human Development Report 2004: Cultural Liberty in Today’s Diverse World (2005) 89 electronic document <hdr.undp.org/en/media/hdr04_complete.pdf> last visited on 27/11/2012.

⁵⁵ See electronic document at <hdr.undp.org/en/media/hdr04_complete.pdf> last visited on 27/11/2012.

- (2) the integration of traditional knowledge-related periodicals in minimum documentation lists for non-patent literature;
- (3) the further evolution of search and examination procedures; and
- (4) increased searching of databases and digital libraries containing traditional knowledge documentation data.⁵⁶

Given the possibilities described by WIPO above, the creation of national and regional databases and archives could be unworkable in the long run and bring more harm than benefit to indigenous communities. First, while the archives and digital databases could be regularly searched by Patent Offices all over the world to assess the novelty of the product whose patent is pending, documentation of the knowledge will not, in fact, guarantee the benefit sharing with the holders of the knowledge in question. Then, as clearly questioned by Dutfield in his article:⁵⁷ “How would TK have to be described in order to constitute novelty-destroying prior art?” Dutfield gives the example of plant compounds that, once isolated and mixed with other natural or non-natural remedies, can present a degree of newness that will make the new remedy eligible for patenting. The fact that the compound is isolated and mixed with new compounds might not change the fact that the intrinsic properties of the compound were detected and used first by the indigenous community which firstly understood its properties. Biologically, compounds might be mixed with other genes and yet maintaining the same characteristics they originally had in isolation. As pointed out by Dutfield,⁵⁸ in fact, one can win the novelty argument by just changing “the substance of life-form in some way such as by adding something to it (eg a gene), subtracting something from it (eg purifying it), mixing it with something else to create a new or synergetic effect, or structurally modifying it so that it differs in an identifiable manner from what it was before”. He also reminds the reader that in some jurisdictions, it is actually possible to get a patent on a natural substance by simply describing it for the first time in a language of biochemistry,

⁵⁶ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2001) Doc WIPO/GRTKF/IC/2/6 at para 68.

⁵⁷ Graham Dutfield “Legal and Economic Aspects of Traditional Knowledge” in Keith E Maskus and Jerome H Reichman (eds) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, 2005) at 510.

⁵⁸ See Graham Dutfield *Intellectual Property Rights and the Life Science Industries: a Twentieth Century History* (Ashgate, Aldershot, 2003).

which would dismiss centuries of oral transmission and description of the substance and its use.⁵⁹ On a more local level, the sharing of restricted information in databases could cause great harm to the community and to those who are appointed as guardians of the knowledge, and facilitate a process of exploitation that indigenous peoples are trying to prevent. This does not mean that the creation of archives and databases of TK is entirely wrong. The Yekuna peoples of the Amazon basin, for example, have developed a cultural archive that is used for pedagogic purposes in schools to educate children to the ceremonies and traditions of the community and defend the TK from any form of unlawful exploitation.⁶⁰ The same happened in India, with the institution of a navigable computerised database (known as the TKDL) of documented TK related to medical remedies and plants which contains approximately thirty million entries of Indian TK. The initiative was organized by the Department of Indian Systems of Medicine and Homeopathy, and supervised by an interdisciplinary task force.⁶¹ The Traditional Knowledge Resource Classification (TKRC, 2001)⁶² was created as an Indian digital knowledge repository of traditional knowledge, especially medicinal plants and formulations used in medicine. Today, it represents an “innovative, structured classification system that has been designed to facilitate the systematic arrangement, dissemination and retrieval of the information in the traditional knowledge” and it simplifies the access to traditional knowledge, remedies and practices.⁶³

⁵⁹ Dutfield supra.

⁶⁰ See Jo Recht “Hearing Indigenous Voices, Protecting Indigenous Knowledge” (2009) 16 *International Journal of Cultural Property* 233 at 242.

⁶¹ “For this objective, a national task force has been created which has already collected and processed various published data on traditional medicinal plants. It is supposed that the data collection will be included in the worldwide intellectual property digital library to constitute searchable prior art. Annex I to this document includes an extract of the data showing basic contents of TKDL ... With a view to facilitating access to TKDL, the task force has also elaborated the draft of the Traditional Knowledge Resources Classification (TKRC) relating to traditional medicine in India. Its extract is shown in Annex II to this document. The development of TKRC has been influenced, to a considerable extent, by the structure of the IPC” see WIPO Special Union for the International patent Classification (IPC UNION) Committee of Experts (2001) Doc IPC/CE/30/9 <www.wipo.int/edocs/mdocs/classifications/en/ipc.../ipc_ce_30_9.pdf> last visited on 25/09/2012.

⁶² Traditional Knowledge Resource Classification (TKRC) electronic document <www.tkdil.res.in/tkdil/langdefault/common/TKRC.asp> last visited on 19/10/2012.

⁶³ “The TKRC is based on the International patent Classification system (IPC), with the information classified under section, class, subclass, group and subgroup for the convenience of its use by the international patent examiners” see Report of the Commission on Intellectual Property Rights - *Integrating Intellectual Property Rights and Development Policy*, at Chapter 4 – Traditional Knowledge and Geographical Indications (London 2002) at 81.

The archives could indeed work for the knowledge that is entering the public domain (or at risk to enter it) and is fundamentally of a tangible nature. However, archives would be of no use for the protection of the intangible aspects of the tangible. In most cases it would indeed be highly immoral and unlawful (according to tribal laws) to share sacred/secret knowledge with all the members of the community who are not supposed to know about such knowledge. The same applies for the sacred rituals in which the knowledge is used or disclosed. Moreover, in order to guarantee the success of such initiatives, indigenous peoples should be the ones developing and managing the archive according to their traditions and customs. Today, in fact, most of the material in the possession of institutions, archives and libraries is not owned by indigenous peoples, but rather by the people who actually collected, fixed or reproduced the information. This creates great dilemmas on 'who' owns the documents. These documentations, most of the time, exist because of historical and cultural forces that pushed to study and record indigenous traditions in ancient and more recent times. Quite interesting is the example of National Archives in New Zealand. Stored records and cultural expressions are governed by the Public Records Act (2005), which is trying to encourage the spirit of partnership and goodwill between Māori and non-Māori as envisaged in the ideals of the Treaty of Waitangi. In New Zealand, TK is stored as 'sensitive information' and as such it would involve the use of practices that are not usually necessary in the case of information. However, all the restrictions imposed by the Public Records Act (which are not substantially impressive anyway) are overridden by the Official Information Act (1982), which prevails in the case of archived documentation and heritage.⁶⁴ As seen in chapter 7, the claimants of the Wai 262 case argued that a "considerable amount of mātauranga is held by the National Library and Archives New Zealand ... and that this often touches on

⁶⁴ "... the Public Records Act ... only requires 'appropriate account' to be taken of the Treaty of Waitangi. Counsel submitted that the Act's 'overriding principles' of public access has the clear potential to collide with Māori concerns. Access restrictions are determined by depositing agencies and there is no requirement for Māori to determine issues of access. Nor is there currently any 'provision for iwi Māori to be in direct position to exercise kaitiakitanga with respect to these documents'. Counsel felt that Archives New Zealand staff was "attuned" to issues around who holds 'the mana in terms of the archival material' ... but the ultimate reality is that the legislation – including the overriding Official Information Act – ultimately determines their actions" see *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* Vol 2 (The Waitangi Tribunal, Wellington, 2011) at 534, Doc S4 at 73-74.

sensitive information around rongoā, whakapapa, and other confidential mātauranga”.⁶⁵ In addition to that, Māori people have serious concerns about the long-term protection of this material. As previously stressed, IPR law is limited in time, whereas indigenous culture has no expiry date. And its importance and spiritual value does not necessarily fade over time. Furthermore, such institutions often interfere dramatically with the duties of the guardians to safeguard the knowledge stored. Instead of supporting the guardians’ access and involvement with the management of Māori heritage, the boards’ meetings most of the time do not involve the guardians in the decision making. Wai 262 claimants argued that kaitiaki (guardians) should be fully involved in any decisions relating to their TK and TCEs and “databases, registers and other repositories of traditional knowledge must be highly confidential so as not to facilitate misappropriation and misuse”.⁶⁶ Who should facilitate Māori access and management of their own inheritance? According to the partnership principle envisaged by the Treaty of Waitangi, the Crown should allow and facilitate the kaitiaki relationship with their heritage and the mātauranga embodied, and it should enable kaitiaki to discharge their obligations to Māori TK and TCEs.

The idea that democratic societies should grant freedom of access to information should not trump indigenous peoples’ right to their cultures and to the survival of their traditions as conceived by them holistically. The sensitivity of indigenous culture does not decrease over time and most of it should never enter the public domain.⁶⁷ The Wai 262 Report suggests that documentary mātauranga should “remain as open to the public as it is at present”, however, “where users plan to exploit mātauranga for commercial gain, they would either consult with kaitiaki or seek kaitiaki consent (as appropriate) before doing so”.⁶⁸ Treaty provisions and the language often used in the Report sound vaguely patronizing. It suggests that the Crown is doing Māori a favour by trying to include them in the

⁶⁵ At 533.

⁶⁶ *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* Vol 2.

⁶⁷ Next chapter will discuss why freedom of expression cannot be used as an argument to justify the forced entrance of indigenous TK and cultures within the public domain.

⁶⁸ See *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* Vol 2 at 540.

management of New Zealand heritage. The Crown's attempt to set the argument seems quite inconsistent. Given that most of what is today stored in archives and museums is of dubious provenance and most likely stolen, this seems to suggest that the mentality of the colonizer that arrived and took over everything including any civil, political and cultural right of any pre-existing societies, is today still too alive, well and vigilant. The truth is that, in 2015, in many cases, indigenous peoples do not have the right to self-determine how to preserve their knowledge, while they seem to have no say in the management of their own heritage. In addition to that, a question arises: who decides what is 'appropriate'? And what is the comparative element that sets the benchmark for what can be considered 'appropriate'? Arguably, a basic, logical, guiding principle to ensure that the databases are managed properly and fairly would be to make sure to obtain the prior informed consent from the indigenous peoples who hold the knowledge or are responsible for its protection. Unfortunately, it is often difficult to determine who is the person or group of persons responsible for the reproduction of the knowledge. Moreover, the effect of the provisions managing the creation of the databases does not extend beyond the national borders, and what is protected by law in a country, might not be in another. This means that the prevention of unfair exploitation would be limited to the territory that instituted the Digital Library, but not in other countries that can obtain access to the library. In addition to that, states like the United States simply do "not recognize undocumented knowledge held only abroad as prior art".⁶⁹

From a moral/ethical point of view, the creation of archives and digital libraries create difficulties that involve the intersection between how the Western and the indigenous societies perceive culture and heritage, and consequently how they believe culture should be accessed, controlled and owned. Most of the debate concerns the Western idea of free access to information. The idea of total free access to information is possible in theory; in fact, many documents in the hands of government and agencies controlled by elites, are classified and not

⁶⁹ "Although the law does not allow an applicant to receive a patent if 'he did not himself invent the subject matter sought to be patented', there is a danger that many people will simply copy this knowledge and claim they have come up with a new invention" see Graham Dutfield 'TRIPS-related Aspects of Traditional Knowledge' (2001) 33 *Case Western Reserve Journal of International Law* at 262 electronic document <www.academia.edu/860241/TRIPS-related_Aspects_of_Traditional_Knowledge> last visited on 05/01/2013.

accessible by the population at large. What 'free access to information' means is that people in charge decide what and how information can be accessed. The fact that indigenous peoples never structured themselves into a system of 'free access to information' means little or nothing to the national policies of developed countries. As clearly pointed out by Taubman:⁷⁰

Many local and indigenous communities are concerned that growing global interest in their TK and traditional cultural expressions is not matched by respect for the customs, laws and beliefs that identify and sustain their communities and that shape the very heritage that appeals to external consumers. Initiatives to safeguard, for instance through documenting and publishing it, may in fact amount to a betrayal of sacred or social duties to protect their heritage, to the detriment of customary means of preserving and passing on TK. It may amount to unwanted transfer of treasured knowledge to the public domain, or to passing on to external interests who are not bound by the traditions embedded in the knowledge that define its spiritual and ethical context.

What happens if indigenous peoples decide to restrict the access to the knowledge archived? Especially given the fact that much of the recorded culture was registered without consent from indigenous peoples and guardians of knowledge during colonial time and is of sacred/secret nature? According to Anderson⁷¹ (quoting Lynch⁷²):

... although archives continue to be valuable facilities, the practices and struggles associated with composing, assembling and controlling access to documents play substantive role in history as well as the scholarly reconstruction of history.

⁷⁰ Antony Taubman "Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge" in Keith E Maskus and Jerome H Reichman (eds) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, 2005) at 522.

⁷¹ Jane Anderson "Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use" at 16 electronic document <andersonip.info/PDF/Anderson_AccessControl.pdf> last visited on 03/10/2012

⁷² Michael Lynch "Archives in formation: Privileged spaces, popular archives, and paper trails" (1999) 22 *History of the Human Sciences* 65 at 67.

And yet, libraries and archives can also be examples of the historical struggle that occurred between indigenous peoples and colonizers/missionaries during colonization time. In Australia, for example, there is a huge collection of photographic material where Aborigines are often represented in compromised and degrading positions. Not only can the nature of the material be very sensitive, but indigenous peoples have no property rights over it and have therefore no say in its management. One could argue that it is historically important to collect documents that show how indigenous peoples were treated during and after colonization; however, it might also be legitimate to argue that the descendants of the people represented in photographs and documents might consider it highly offensive to see their ancestors portrayed in racist and degrading contexts. The idea of translating TK into a 'public' good remains not applicable to indigenous peoples.

Given the inapplicability of WIPO's ideas in the field of preservation (making the knowledge public), in most cases, only defensive protection mechanisms remain available to indigenous peoples. The WIPO Intergovernmental Committee recognises several different concepts of protection to be used against:⁷³

- unauthorized commercial exploitation of TK or TCEs;
- insulting, degrading or culturally offensive use of this material;
- false or misleading indications that there is a relationship with the communities in which the material has originated; and
- failure to acknowledge the source of material in an appropriate way.

While it is possible to apply these measures to TK that has already entered the public domain (lawfully or not), the ideas proposed by WIPO are unrealistic and slightly neo-colonialist. Even if over the years WIPO has been active in recording many "initiatives of indigenous and local communities and other national/regional institutions have documented large amounts of traditional knowledge in order to conserve it and to avoid its disappearance",⁷⁴ however, it

⁷³ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Twelfth Session, Genève, 2008) Doc WIPO/GRTKF/IC/12/5(b).

⁷⁴ See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2001) Doc WIPO/GRTKF/IC/2/6 at para 5.

also recognizes that, although the “initiatives have developed extensive compilations and traditional knowledge databases”, they “have not elaborated intellectual property options or strategies to protect the traditional knowledge itself or its compilations”.⁷⁵ WIPO, in fact, pretends that indigenous people bring out from their traditional milieu knowledge that was never supposed to enter the public domain, and share it with outsiders that might have the means and economic resources to exploit it. In doing so, indigenous peoples should often translate and fix information using a language that is not theirs and codifications that exist for the written word, but not in the case of oral transmission,⁷⁶ and identifying an author/creator that does not de facto exist. In most cases the non-fixability of information or unfixed material in general cannot count as prior art, and when international law does indeed consider unwritten material as prior art, it still considers it enforceable only in case the knowledge has been made public and available before the filing date of the patent or copyright. The Patent Cooperation Treaty (PCT),⁷⁷ for example, considers the unwritten disclosure as:⁷⁸

(b) when any written disclosure refers to an oral disclosure, use, exhibition, or other means whereby the contents of the written disclosure were made available to the public, and such making available to the public occurred on a date prior to the international filing date, the international search report shall separately mention that fact and the date on which it occurred if the making available to the public of the written disclosure occurred on a date which is the same as, or later than, the international filing date.

Article 18 of the Berne Convention gives eligibility to protection to “(1) all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection”,

⁷⁵ See *supra*.

⁷⁶ According to Manuel Ruiz “it seems clear that oral disclosure, use, exhibition or other means of disclosure will only be considered relevant during an international search if they are substantiated by *written* disclosure. Indeed, as important (and common) as oral traditions might be among indigenous communities, there are practical aspects of patent searching procedures which would make it necessary to evidence and substantiate traditional knowledge and practices in some written form” see “The International Debate on Traditional Knowledge as Prior Art in the Patent System: Issues and Options for Developing Countries” CIEL (Centre for International Environmental Law, 2004) at para 35.

⁷⁷ Patent Cooperation Treaty (Washington on 19 June 1970) amended on 28 September 1979, modified on 3 February 1984, and on 3 October 2001. As in force from April 1, 2002)

⁷⁸ PCT, Relevant Prior Art for the International Search at Rule 33.

which obviously does not apply to all knowledge that has been circulating among indigenous communities for a long time. In addition to that, much of the mass production of traditional designs is not produced within the national borders, and therefore not protectable by national jurisdictions. Having said that, however, there is no international harmonization of what constitutes prior art. In this regard, WIPO suggests that there should be an international agreement on what constitutes prior art and it recognises three ways in which the disclosure of information can constitute prior art:⁷⁹

- by a description of the invention in a published writing or publication in other form;
- by a description of the invention in spoken words uttered in public, such a disclosure being called an oral disclosure; and
- by the use of the invention in public, or by putting the public in a position that enables any member of the public to use it, such a disclosure being a “disclosure by use”.

However, at the same time, WIPO acknowledges the difficulty of circumscribing what constitutes prior art and questions:⁸⁰

- is prior art counted if it is only available in foreign languages (including dead languages), or minority languages? (or indigenous languages, songs, stories);
- if prior art must be ‘published’ to be taken into account, what criteria apply for prior art to be an eligible form of publication?;⁸¹ and

⁷⁹ WIPO *Intellectual Property Handbook* (2004) at para 2.17; see also WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2001) Doc WIPO/GTRKF/IC/2/6.

⁸⁰ Questionnaire on Recognition of Traditional Knowledge and Genetic Resources in the Patent System Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2004) Doc WIPO/GTRKF/IC/Q.5.

⁸¹ “What counts as publication or public availability on the internet or on other digital networks? Is there a requirement for networks to be publicly accessible? Is material on proprietary (pay for use) databases or digital networks included as potential prior art? Does this apply to databases or networks that are private, for example accessible only by members of a particular community, or employees of a particular company, university or research institute? What conditions apply for material uploaded on the Internet to be taken into account as prior art?” see Questionnaire on Recognition of Traditional Knowledge and Genetic Resources in the Patent System Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2004) Doc WIPO/GTRKF/IC/Q.5 electronic document <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_q_5.pdf> last visited on 08/02/2015.

- if an element of TK (including TK associated with certain genetic resources) is considered available to or accessible by the public outside the original community that holds the TK, but the skills to interpret or practice the art of TK are limited to the community only, how would the person skilled in the art be assessed for the determination of inventive step?

Going back to the point described above, it is easy to understand why TK cannot account as prior art.⁸² WIPO suggests that:⁸³

... a document will only destroy the novelty of any invention claimed if the subject matter is explicitly contained in the document. The subject matter set forth in a claim of an application under examination is thus compared element by element with the contents of each individual publication. Lack of novelty can only be found if the publication by itself contains all the characteristics of that claim, that is, if it anticipates the subject matter of the claim.

Again the whole discourse seems totally useless when applied to the knowledge held by the guardians of knowledge whose duty of care has traditionally been bound to secrecy or limited sharing among the community. And again, the focus of IP law is to give exclusive rights to the product of the idea, and not to the idea itself; which means that 'knowledge' is still unprotected by law. How can the knowledge in the possession of the guardians be recorded in a way that can count as prior art? What legitimacy has the knowledge transmitted among a limited number of selected people?

Arguably, information held by the guardians can be gathered with difficulty (especially the very ancient and spiritual knowledge) and might have deteriorated over time. Secondly, when it comes to indigenous culture, it is often impossible to determine who the author of the TK is. And even if the art is registered as prior art, the name of the creator or creators is still required to

⁸² It is often unfixed; the knowledge is shared within the community only and often among a limited number of people within the same community; the term 'public' has often no connotation for indigenous peoples' TK. Their knowledge is often not shared with the public, and possibly never will be; the term 'public' has often no connotation for indigenous peoples' TK. Their knowledge is often not shared with the public, and possibly never will be.

⁸³ WIPO *Intellectual Property Handbook* (2004) at para 2.21.

implement such a claim. On the topic, the Berne Convention says nothing about knowledge or art orally transmitted and shared by a limited number of people and only within a specific community. In addition to that, the registration of the knowledge in accordance with Western IP laws is a limitation that is against most of the existing jurisprudence that advocates the freedom of everyone to participate in the cultural life of the community and manage such culture according to the values and laws that survive within the community as stated in Art 27 of the ICCPR.⁸⁴ If prior art cannot be used to safeguard indigenous TK and TCEs, what else can be suggested as a defensive mechanism?

In his article Correa⁸⁵ suggests the creation of a regime preventing the misappropriation of TK based on three main elements: documentation of TK, proof of origin or materials and prior informed consent. Correa refers to two United Nations documents that support his misappropriation regime. CBD-COP Decision V/16⁸⁶ requests parties to:

... support the development of registers of traditional knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity through participatory programmes and consultations with indigenous and local communities, taking into account strengthening legislation, customary practices and traditional systems of resource management, such as the protection of traditional knowledge against unauthorized use.

The second UN document that inspired Correa is the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples elaborated in 1995 by Erica-Irene Daes.⁸⁷ According to Dutfeld, Correa's misappropriation regime should incorporate also:

⁸⁴ Article 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

⁸⁵ Carlos M Correa "Traditional Knowledge and Intellectual Property" (The Quaker United Nations Office (QUINO), Genève, 2001).

⁸⁶ See CBD, COP 5 Decision V/16 electronic document <www.cbd.int/decision/cop/?id=7158> last visited on 10/12/2012.

⁸⁷ Principle 26 – "National laws should deny to any person or corporation the right to obtain patent, copyright or other legal protection for any element of indigenous peoples' heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the

- the concept of unfair competition;
- moral rights; and
- cultural rights.

Indeed, unfair competition could be used in those cases when TK holders engage in commercial activities related to know-how, medicinal plants, artworks and handicrafts when the trade of the above is affected by unfair practices committed by others. Article 10bis⁸⁸ of the Paris Convention describes which acts constitute unfair competition and why. While the article is useful in cases where indigenous peoples engage in commerce in their own goods, it produces inappropriate results in cases where the knowledge is undisclosed and still in possession of the guardians of knowledge. Someone could argue that there is no harm if indigenous knowledge, which is not commercialised or intended to be commercialised, reaches the general market for the benefit of those who accelerated the process. This would imply that, if indigenous holders did not intend to benefit from commercial exploitation of their culture, it is not unfair if someone else does. This reasoning is not only unethical, but involves the misappropriation of indigenous culture and infringes a whole set of cultural rights that can be found in different international laws and that can be summarised as:

- the right to protection of artistic, literary and scientific works;
- the right to develop a culture;
- the right to respect for cultural identity;

sharing of ownership, control, use and benefits”; Principle 27. “National laws should ensure the labelling and correct attribution of indigenous peoples’ artistic, literary and cultural works whenever they are offered for public display or sale. Attribution should be in the form of a trademark or an appellation of origin, authorized by the peoples or communities concerned” see electronic document <<http://ankn.uaf.edu/iks/protect.html>> last visited on 10/12/2012.

⁸⁸ Article 10bis: “(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition. (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. (3) The following in particular shall be prohibited: (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods”.

- the right of minority peoples to respect for identity , traditions, language, and cultural heritage;
- the right of a people to its own artistic, historical, and cultural wealth; and
- the right of a people not to have an alien culture imposed on it.

The best way to preserve indigenous heritage and culture seems to reside in the stewardship role of the guardians of knowledge. Once in their hands, the knowledge is regulated by customary laws that have guaranteed for centuries the preservation of the tangible and intangible heritage. Its success is proved. As suggested by the recommendations of Wai 262, it is by safeguarding the guardians' special role, that the knowledge can consequently be safeguarded. However, as it will be seen in the next section, IP laws struggle to accommodate the needs and expectations of the guardians, and to recognise their role within indigenous communities.

9.3 – Guardianship and Intellectual Property Laws: An Ongoing Struggle

This section will analyse the broad concept of TK as inclusive of the knowledge that might or might not have a commercial value. While this thesis is focussed on the intangible sacred knowledge guarded by indigenous custodians, it is important to briefly discuss the knowledge that is still in the hands of the custodians, but is not necessarily sacred and therefore can be shared within and outside the community. Such knowledge might also have economic value for the Western world and indigenous peoples could benefit from its commodification. In this case, it is up to the custodians (based on their experience and the customary laws of the community) to decide which knowledge can be commodified, how and for what purpose.

According to WIPO, in today's world, guardians or TK holders can take appropriate steps to prevent others from disposing of their knowledge. WIPO calls these steps 'positive protection'.⁸⁹ WIPO suggests that the best way to

⁸⁹ "Positive protection is the granting of rights that empower communities to promote their traditional knowledge, control its uses and benefit from its commercial exploitation. Some uses of traditional knowledge can be protected through the existing intellectual property system, and a number of countries have also developed specific legislation. However, any specific protection afforded under national law may

protect indigenous TK is to promote, record and control it. Again, the idea could work for the TK that they could decide to share now or in the future, but it would not be feasible for the knowledge that is not supposed to enter the public domain (intangible sacred/secret knowledge). In the *Milpurrruru and Others v Indofurn Pty Ltd and Others* case,⁹⁰ although the claimant succeeded in blocking the reproduction on rugs of sacred images belonging to the community, the design circulated anyway; its design was recorded in computer programs, and buyers might have already stepped on the sacred images that were represented. To outsiders the block imposed to the circulation of the design was a success. However, the damage was already done and people of the Ganalbingu community had suffered consequently. In addition to that, copyright law accepts artworks and cultural expressions that present a recognisable level of innovation (originality); this means that sacred designs could still be present in the TCE, but as long as the artwork is considered original, copyright will be granted without hesitation. The intangible intrinsic character and value of some but not all TK makes it, in fact, non-protectable under copyright and patent laws.⁹¹ Copyright and patents are both limited in time, and the creation/invention is expected to enter the public domain after the time-protection for the benefit of the world at large. In this framework, long-lasting TK does not qualify for protection. Both copyright and patent laws are based on the concept of individual creator or joint authorship, and recognise property rights to products as they exist in a specific moment in time; which means that new forms of TCEs which do not yet exist, but derive from traditional intangible (from the Latin *non tangere* – untouchable;

not hold for other countries, one reason why many indigenous and local communities as well as governments are pressing for an international legal instrument. WIPO's work on traditional knowledge addresses three distinct yet related areas: traditional knowledge in the strict sense (technical know-how, practices, skills, and innovations related to, say, biodiversity, agriculture or health); traditional cultural expressions/expressions of folklore (cultural manifestations such as music, art, designs, symbols and performances); and genetic resources (genetic material of actual or potential value found in plants, animals and micro-organisms)" see WIPO electronic document <www.wipo.int/pressroom/en/briefs/tk_ip.html>; "Two aspects of positive protection of TK by IP rights are being explored: Preventing unauthorized use, and Active exploitation of TK by the originating community itself. Negotiations on an international legal instrument are taking place within the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. In some countries, *sui generis* legislation has been developed specifically to address the positive protection of TK. In addition, providers and users may also enter into contractual agreements and/or use existing IP systems of protection" see WIPO electronic document <www.wipo.int/tk/en/tk/> last visited on 08/02/2015.

⁹⁰ *Milpurrruru and Others v Indofurn Pty Ltd and Others* case, Federal Court of Australia, General Division 130 A.L.R. 659 [1994].

⁹¹ Berne Convention for the Protection of Literary and Artistic Works (1886, last amended in 1979); the Patent Law Treaty (adopted at Genève on June 1, 2000).

something that cannot be touched by hand) knowledge, are not protectable under Western laws. Such staticity does not fit with the constant evolution of TK and TCEs. Many TCEs have existed and evolved for many generations. In this case, the limited period of protection guaranteed by copyright and patent law cannot adequately safeguard indigenous evolving traditions. Another important point worth discussing involves the complex stratification of indigenous peoples TK. Indigenous knowledge has no horizontal development, but rather a vertical one, where different strata hold different information whose circulation can be either encouraged or restricted. The more the information becomes sensitive, the fewer people have access to it.⁹² Spiritual knowledge is also mostly unfixed. Outside indigenous communities, knowledge is organised more horizontally. Someone conveyed the idea into a product and fixed it, while the suitable protective mechanism is sought to implement exclusive rights (economic in most cases) to the innovative production.⁹³ In this case, IP laws encourage disclosure and information sharing on what are considered 'fair terms'. The Tunis Model Law for Copyright⁹⁴ stresses that the fixation requirement cannot be applied to works of folklore given the fact that they are most of the time unfixed and transmitted orally from one generation to another. In this case, the Model Law comes to the conclusion that works of folklore (at that time the indigenous knowledge and TCEs were defined as works of folklore) deserve protection, and in the case of economic and moral rights attached to the cultural expression, such rights will have no limit in time and shall be managed by the national authority "empowered to represent the people that originated them" (Section 6, para 39). In other words, the creations of indigenous peoples should be managed

⁹² Graham Dutfield "TRIPS-related Aspects of Traditional Knowledge" (2001) 33 *Case Western Reserve Journal of International Law* at 261 electronic document <www.academia.edu/860241/TRIPS-related_Aspects_of_Traditional_Knowledge> last visited on 05/01/2013.

⁹³ "It would be extremely difficult for a shaman or indigenous group to complete a patent specification. While a useful characteristic of a plant or animal may be well known to such an individual or group, the inability to describe the phenomenon in the language of chemistry or molecular biology would make it almost impossible to apply for a patent, even if the fees could be afforded" see Dutfield *supra*.

⁹⁴ The Tunis Model Law on Copyright was adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis from February 23 to March 2, 1976, with the assistance of WIPO and UNESCO. The Tunis Model Law, developed by the UN Educational, Scientific and Cultural Organisation (UNESCO) and WIPO in 1976, offered developing countries a template for implementing the Berne Convention for the Protection of Literary and Artistic Works, while having regard to domestic legislation and particular interests. It was "designed to be like a complete copyright act" said KEI President James Love, touching upon issues relating to protection of folklore, exceptions and limitations to rights, fair use, and the right of translation to reproduction see electronic document <www.ip-watch.org/2014/05/01/at-wipo-soft-law-presented-as-a-solution-in-international-copyright-law/> last visited on 08/02/2015

by national authorities whose legal structures are reflective of a Western legal framework. What if the national authority in charge to represent indigenous peoples' TK and TCEs or expressions of folklore has no interest in safeguarding them?

The Model recognizes the issue at stake, but it does not concede any autonomy to indigenous peoples to dispose of their culture as they wish outside the national control. The presumption of most of Western IP laws (clearly stated at the beginning of the Model) believes that "works of the mind are intended for widespread distribution in the world beyond territorial frontiers" (Introduction, para 1). That is why, the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (WIPO-UNESCO, 1985) underline how "in the industrialized countries, expressions of folklore are generally considered to belong to the public domain. This approach explains why, at least so far, industrialized countries generally did not establish a legal protection of the manifold national or other community interest related to the utilization of folklore" (para 3). The unwritten form of TK conflicts with the patent's 'enablement' as stated in Art 27.1 of the TRIPS Agreement,⁹⁵ and the copyright's fixation requirement as restated in Art 9.1 and 9.2 of the TRIPS Agreement.⁹⁶ Both laws also require the individuation of the inventor/creator who, in the case of indigenous peoples, is hardly identifiable in the communal and evolving development of TK. Additionally, while Western inventors keenly apply to patent and copyright law with the premise to protect and benefit from their creation/invention, a good part of indigenous TK is of a spiritual and sensitive nature, is non-sharable to the whole community, and its disclosure to the uninitiated would violate its spiritual significance. In addition to that, the whole application process, although it does not guarantee the patent,

⁹⁵ Article 27.1 TRIPS Agreement reads: "Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced".

⁹⁶ Art 9 TRIPS: 1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom. 2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

can be very onerous for indigenous peoples.⁹⁷ Indeed, indigenous peoples are often limited by their unfamiliarity with the Western IP system, and if aware of the legal mechanisms, they might find the expenses of acquiring a patent prohibitive. Additionally patent and trade secret laws require that the information protected be of a 'commercial nature'. On the same logic, trade policies are often a very complex set of rules which do not take into consideration the needs and expectations of indigenous stakeholders.⁹⁸ The information held by guardians and TK custodians is not necessarily commercially valuable. Its value derives from the fact that it is unknown by the public at large, contrary to the general belief that TK is in the public domain. In the case of the patent system, some countries⁹⁹ have so far included in their jurisdiction the requirement for 'disclosure of origin', to prevent the trafficking of information and knowledge whose derivation is of uncertain nature, and they have made it a formal condition of patentability. Certificates of origin are generally used in trade as a guarantee that the goods that are supposed to be coming from a specific country that enjoys specific tariff privileges are actually coming from that country. The certificate works as an "official recognition of the legal origin (legal access) of a particular sample of a genetic resource or piece of information linked to traditional knowledge".¹⁰⁰

⁹⁷ "The main practical difficulty that deters traditional peoples and communities from filing patents is the expense of doing so, which includes payments to the patent attorney hired to complete the application, and the filing, prosecution, and renewal fees. Legally enforcing the patent against infringers is likely to be even more" see Graham Dutfield "TRIPS-related Aspects of Traditional Knowledge" (2001) 33 *Case Western Reserve Journal of International Law* at 261.

⁹⁸ "Trade policies in the region have generally not taken into consideration the interests and needs of indigenous and local communities. This is valid for bi and multi-national trade agreements, some of which are said to impose a new ideological, legal, and political framework that will determine the relations between the transnational capital, the States, and the Latin-American peoples. The complexity of the trade policies and agreements makes it difficult for indigenous and local communities to understand all their implications" see Gonzalo Oviedo and Flavia Noejovich "Composite Report on the Status and Trends Regarding the Knowledge, Innovations, and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity, Secretariat of the Convention on Biological Diversity" (2005) 11 electronic document <www.cbd.int/doc/meetings/tk/acpow8j.../acpow8j-02-02-add4-en.pdf> last visited on 02/10/2012.

⁹⁹ "Brazil, Colombia, Peru, Costa Rica, Egypt, Switzerland India and China have introduced the disclosure of origin for patentability; New Zealand and Turkey are in the process of developing such laws. Countries of the EU such as Belgium, Denmark and Sweden have incorporated disclosure of origin requirement in their national jurisdictions" see Tzen Wong and Graham Dutfield (eds) *Intellectual Property and Human Development* (Cambridge, Cambridge University Press, 2011) at 154.

¹⁰⁰ "In the case of the disclosure of origin, the objective is that the origin of the genetic resource or traditional knowledge used or incorporated in an invention or a creation is expressively indicated in the intellectual property filing procedure so as to assure compliance with the CBD and national access legislations. Disclosure of origins is considered by some to be an adequate way to prevent illegal access and use of genetic resources by non-authorized third parties within the intellectual property system" see David

While developing countries might have all the interest to respect the disclosure of the origin clause, the same cannot be said of developed countries whose riches often depend on the exploitation of knowledge that developing countries fail to protect or use. In the case of developing countries, disclosure of origin would be used as what Graham Dutfield¹⁰¹ identifies as a “positive defensive protection” requirement into Patent law that traditional knowledge holders and guardians could invoke to make sure that they obtain their fair participation and sharing of any benefit arising from the commercialization of their knowledge. However, the enforceability of disclosure of origin seems incompatible with Articles 27.1, 30 and 62 of TRIPS, by placing a new condition on patent filing procedure that is not included and therefore allowable under the Agreement. Countries, in fact, and especially the developed ones, argue that the disclosure of origin clause would dramatically affect the freedom of patent applicants and holders. Arguably, it would add to the already existing condition for patentability (novelty, inventive step and industrial application) required by Art 27.1. Article 62 establishes the conditions and maintenance of any intellectual property right as limited to those introduced in Art 27.1.¹⁰² Dutfield suggests that, not only disclosure of origin is incompatible with TRIPS, but it might not be a good idea anyway. While, in fact, disclosure of origin may be an essential requirement in case there would be any need to measure the novelty requirement and the inventive step against any asserted prior art claim, the risk, however, is that a patent applicant might decide to avoid risks and omit any disclosure of the TK that is included in his patent application. In that case, there would be no reason for an examiner to assume that an invention is based on TK unless the applicant declares so, and in the aftermath of the granting of the patent, TK holders are able to document that the invention is not novel because the TK used has

Vivas Eugui “Requiring the Disclosure of the Origin of Genetic Resources and Traditional Knowledge: the Current Debate and Possible legal Alternatives” in Christophe Bellmann and others *Trading in Knowledge* (Earthscan, London, 2003) at 197.

¹⁰¹ See Tzen Wong and Graham Dutfield (eds) *Intellectual Property and Human Development* (Cambridge, Cambridge University Press, 2011).

¹⁰² David Vivas Eugui “Requiring the Disclosure of the Origin of Genetic Resources and Traditional Knowledge: the Current Debate and Possible legal Alternatives” in Christophe Bellmann and others *Trading in Knowledge* (Earthscan, London, 2003) at 201.

already been circulating or has been 'stolen' from their community.¹⁰³ Such omission would not disqualify the patent application from "being accepted, being granted, or being subsequently enforced".¹⁰⁴ In the case of a mandatory disclosure of origin requirement, for any dishonest behaviour (including voluntary omission of disclosure of origin), the patent application would be either not granted, rejected or revoked. According to experts, disclosure of origin would be in conflict with TRIPS and, unless TRIPS is amended, it cannot be made mandatory; however, disclosure of origin could be requested not at the stage of the granting of the patent but as a condition for its enforceability after the patent has been granted.¹⁰⁵ According to Eugui,¹⁰⁶ Art 27.1 of the TRIPS controls the "substantive requirements" in the application process of a patent. Moreover, Eugui explains that Art 27.1 does not prohibit exceptions that are "destined to solve problems that only exists in certain product sectors".¹⁰⁷ The fact that provisions are not included within TRIPS does not imply that they are wrong or unnecessary per se. The needs and expectation of the world in 1994 were definitely different from those that societies are facing today. At the same time, indigenous voices and expectations were at a different stage in the eyes of developed and developing countries. At the time of the negotiations of TRIPS, United States, Europe and Japan "supported by business associations representing transnational corporations" successfully attempted "to place IPRs on the agenda of the Uruguay Round of GATT, and then to force through an agreement covering a wide range of IPR standards going far beyond the original aim of preventing counterfeiting of trade marked goods and piracy of copyrighted work".¹⁰⁸

¹⁰³ Graham Dutfield *Protecting Traditional Knowledge and Folklore*, Intellectual Property Rights and Sustainable Development (UNCTAD-ICTSD, Genève, 2003) at 3.

¹⁰⁴ See Graham Dutfield *Protecting Traditional Knowledge: Pathways to the Future* (ICTSD, Genève, 2006) at 43-44.

¹⁰⁵ According to Dutfield: "The expert suggests that framing the disclosure requirement as a condition for enforcement could adopted multilaterally in the framework of WIPO and then, perhaps, incorporated into TRIPS" see at 2.

¹⁰⁶ Eugui explains that "the differentiation between substantive and formal requirements is an artificial one since in both cases the failure to fulfil those requirements will have the same effect, which is that of not granting the patent or revoking it as the case may be" see David Vivas Eugui "Requiring the Disclosure of the Origin of Genetic Resources and Traditional Knowledge: the Current Debate and Possible legal Alternatives" in Christophe Bellmann and others *Trading in Knowledge* (Earthscan, London, 2003) at 202.

¹⁰⁷ Supra at 202.

¹⁰⁸ Christophe Bellmann and others *Trading in Knowledge* (Earthscan, London, 2003) at 2.

The suggestion that TRIPS is in need of revision, is not new. In 2002, Brazil, China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe jointly submitted a paper to the Council for TRIPS. The examination made by the mentioned countries called for TRIPS to be amended. The paper required that member states of WTO when applying “for a patent relating to biological materials or to traditional knowledge”¹⁰⁹ shall provide as a condition to be granted the patent:

- disclosure of the source and country of origin of the biological resource and of the traditional knowledge used in the invention;
- evidence of prior informed consent through approval of authorities under the relevant national regimes; and
- evidence of fair and equitable benefit sharing under the national regime of the country of origin.¹¹⁰

While disclosure of origin is important for fairness in trade, it can also be argued that it is important to identify how an invention actually came into existence.

But then again, the requirement influences mostly national patents. India, for example, not only requires disclosure of the source and geographical origin of biological material used in the invention, but considers it a criminal act, punishable with imprisonment, to apply for a patent using a biological resource originating from India whose utilization has not been previously approved by the National Biodiversity Authority.¹¹¹

Some countries are becoming more and more aware of the importance of recognising the invaluable contribution of TK holders and guardians in the development and transmission of valuable TK and obtain prior-informed consent over the knowledge that is developed and commodified in the market; however, as stated in the Composite Report on the Status and Trends Regarding the Knowledge, Innovations, and Practices of Indigenous and Local Communities

¹⁰⁹ Graham Dutfield *Protecting Traditional Knowledge and Folklore, Intellectual Property Rights and Sustainable Development* (UNCTAD-ICTSD, Genève, 2003) at 16.

¹¹⁰ Dutfield at 16.

¹¹¹ Michael A Gollin and Thomas F Barry “China’s Disclosure of Origin Law To Enter Into Force on October 1, 2009” electronic document <www.venable.com/china-disclosure-of-origin-law-to-enter-into-force-on-october-1-2009-09-22-2009/> last visited on 27/09/2012.

Relevant to the Conservation and Sustainable Use of Biodiversity,¹¹² “the concept of free, prior informed consent, considered by indigenous networks to be a basic tool for defining and implementing development models that are socially and culturally accountable, is still in its infancy”. Yet, there is also no mention of prior informed consent in the TRIPS Agreement. The idea of creating a misappropriation regime could succeed in preventing the exploitation of the most public knowledge within the community who freely circulates among the members of the group and outside the group. But the misappropriation regime should take into consideration the fact that indigenous TK and TCEs vary greatly from one indigenous group to another and from one state to another; as well as the laws regulating copyrights and patents laws can vary from country to country and present different levels of restrictions and protections. In fact, national and regional patent laws have yet to harmonise their standards and legislation on how information and material that has already entered the public domain should be described to constitute novelty-defeating prior art.¹¹³ And lastly, how can the system accommodate more spiritual forms of knowledge whose survival and power rest in the limitation of its transmission?

9.4 - The Convention on Biological Diversity and Indigenous Intangible Knowledge

Some international instruments and agreements relevant to the safeguard of indigenous culture and TK vary from aspirational (UNDRIP) to those that impose on parties concrete legal obligations (ILO 169, ICCPR, TRIPS). Among them, the Convention on Biological Diversity¹¹⁴ (CBD) is the first international agreement

¹¹² See Composite Report on the Status and Trends Regarding the Knowledge, Innovations, and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity electronic document <www.cbd.int/doc/meetings/tk/acpow8j-02/official/acpow8j-02-02-add4-en.pdf> last visited on 12/12/2015

¹¹³ Supra.

¹¹⁴ “By February 1991, the Ad Hoc Working Group had become known as the Intergovernmental Negotiating Committee. Its work culminated on 22 May 1992 with the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity. The Convention was opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development (the Rio Earth Summit). It remained open for signature until 4 June 1993, by which time it had received 168 signatures. The Convention entered into force on 29 December 1993, which was 90 days after the 30th ratification. The first session of the Conference of the Parties was scheduled for 28 November – 9 December 1994 in the Bahamas. The Convention on Biological Diversity was inspired by the world community's growing

that makes specific reference to indigenous TK and proposes solutions on how to safeguard it. The CBD (1992) is the result of international negotiations that tried to find legal solutions to the protection of TK and indigenous peoples' interests.

Dutfield¹¹⁵ recognises several aims inherent in the creation of the CBD:

- national and international sui generis regimes;
- legally and non-legally binding instruments and agreements including contracts, guidelines and codes of conduct;
- specific protection measures such as TK databases and disclosure of origin of genetic resources and associated TK in patent applications;
- principles such as prior informed consent and respect for customary law; and
- the incorporation of TK protection provisions in the International Regime on Access and Benefit Sharing.

In the specific, Article 8(j) of the CBD states that:

... each contracting Party shall, as far as possible and as appropriate: subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.

In her book, Lewinski¹¹⁶ explains that by requiring the “approval and involvement of the right holders”, Article 8(j) envisages some sort of proprietary rights of the holders of the relevant knowledge. However, the terminology ‘right holder’

commitment to sustainable development. It represents a dramatic step forward in the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources” see the history of the CBD electronic document <www.cbd.int/history/>.

¹¹⁵ Graham Dutfield *Protecting Traditional Knowledge: Pathways to the Future* International Centre for Trade and Sustainable Development (ICTSD, Genève, 2006) at 24.

¹¹⁶ Silke von Lewinski (ed) *Indigenous heritage and Intellectual Property* (2nd ed, Kluwer Law International, The Netherlands, 2008)

“cannot be readily understood to be confined to rights in the sense of existing entitlements under applicable national law”. Lewinski carries on by saying that the term “‘right’ in this context, very likely refers to a more general concept of rights of indigenous and local communities rather than to existing entitlements under applicable intellectual property rights in a technical sense”.¹¹⁷ In other words, the area of influence of the holders of relevant knowledge remains legally unclear and, consequently, limited to ‘disapproval’. While such disapproval might be important in the decision making processes related to indigenous TK, it does not constitute a ‘right’ per se and can be, therefore, discarded by stakeholders. Articles 8(j) and 15 of the CBD recognises inter alia that access to genetic resources is subject to prior informed consent (PIC) of the provider country and the benefit sharing (fair and equitable sharing). It is understood that this benefit sharing should be based on agreements entered before the disclosure of the knowledge. While the CBD recognises the sovereign rights of states over their natural and genetic resources, on the other hand, it links TK to the resources of a country, leaving to the jurisdiction of a state to dispose of its resources and create, where necessary, *sui generis* legislation that better accommodate indigenous peoples’ needs and expectations. In addition to that, CBD is not self-executing, which means that its provisions do not automatically become part of the domestic laws of signatory member states until they are formally incorporated into domestic law through enactment of CBD compliant legislation. Article 6 states that: “Each Contracting Party shall, in accordance with its particular conditions and capabilities:

- (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and (b)
- Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

¹¹⁷ See Lewinski at 35.

This obviously would necessitate the creation of national legal reforms and measures that would ensure the involvement and approval of the holders of TK. However, Article 8(j) does not indicate the ‘prior approval’ of the holders as a prerequisite to access natural and genetic resources traditionally used and safeguarded by indigenous TK guardians. The missing bit was consequently discussed at the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity (Nairobi, 2000),¹¹⁸ when the General Principles stressed the importance to guarantee “a holistic approach consistent with the spiritual and cultural values and customary practices of the indigenous and local communities and their rights to have control over their traditional knowledge, innovations and practices” (Principle 1), which will consequently accept that “access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices” (Principle 5). In the same Decision V/16 (Convention of the Parties) on Art 8(j), however, it is also stressed the importance to:

... support the development of registers of traditional knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity through participatory programmes and consultations with indigenous and local communities, taking into account strengthening legislation, customary practices and traditional systems of resource management, such as the protection of traditional knowledge against unauthorized use.

Paragraph 18 is particularly enlightening on the actual feasibility of the recommendation when it invites “Parties and Governments to increase the participation of representatives of indigenous and local community organizations in official delegations to meetings held under the Convention on Biological Diversity”. What the Decision actually does is to recognise that the Parties are trying to address indigenous peoples’ issues without the formal representation

¹¹⁸ Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity (Nairobi, 2000) electronic document <www.cbd.int/cop/default.shtml> last visited on 18/01/2016

and participation of indigenous representatives. It is like trying to build a house without the planning aid of an engineer and architect. It is for this reason that, at the Sixth Meeting of the Conference of the Parties (COP-6, 2002), the Bonn Guidelines were created to assist “Parties, Governments and other stakeholders in developing overall access and benefit-sharing strategies, and in identifying the steps involved in the process of obtaining access to genetic resources and benefit-sharing”.¹¹⁹ The Guidelines suggest that Parties that have genetic resources under their jurisdictions should consider the adoption of “measures to encourage the disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights” (Principle 16(d)(ii)). Again the Guidelines encourage the participation of the “relevant stakeholders to the discussion of provisions that would interest them such as the implementation of access and benefit-sharing arrangements” (Principle 17). COP Decision VI/24 (to which the Bonn Guidelines were annexed), in order to address indigenous claims, encouraged states to gather more information and analysis on the role of customary laws and traditional practices in relation to the protection of genetic resources and TK, innovations and practices and their possible relationship with IPR law; prior informed consent disclosure, the efficacy of the country of origin; evidence and role or prior art in the patent and copyright examination process,¹²⁰ and grant fair access to indigenous stakeholders to the international debate.

There are many documents that suggest a greater participation of indigenous stakeholders and a better analysis and documentation that, internationally and locally, could help understand holistically indigenous peoples’ traditions and the

¹¹⁹ “The Bonn Guidelines are intended to assist governments in the adoption of measures to govern access and benefit-sharing in their countries. They were adopted by the Conference of the Parties to the Convention on Biological Diversity (CBD) in 2002” electronic document <www.cbd.int/abs/infokit/factsheet-bonn-en.pdf>; “The Guidelines identify the steps in the access and benefit-sharing process, with an emphasis on the obligation for users to seek the prior informed consent of providers. They also identify the basic requirements for mutually agreed terms and define the main roles and responsibilities of users and providers and stress the importance of the involvement of all stakeholders” electronic document <www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf> last visited on 18/01/2013.

¹²⁰ Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity Decision VI/24 – Access and Benefit-Sharing as Related to Genetic Resources electronic document <www.cbd.int/decision/cop/?id=7198> last visited on 17/01/2013.

management of biologic resources and TK.¹²¹ However, though the intentions seem admirable, as most of the intentions are so anyway, the number of indigenous stakeholders participating in international forums is today still very limited; the chance to have their say even narrower, and the chance to vote practically nullius! To solve the problem, at the Seventh Session of the Conference of the Parties to the CBD (COP-7, 2004), the Working Group on Access and Benefit-Sharing (ABS Working Group) and the Working Group on Art 8(j) noted that “the international regime should recognize and shall respect the rights of indigenous and local communities” and, in order to do so, “the Ad Hoc Open-ended Working Group on Access and Benefit-sharing with the collaboration of the Ad Hoc Open ended Inter-Sessional Working Group on Art 8(j) and Related Provisions” should ensure:¹²²

... the participation of indigenous and local communities, non-Governmental organizations, industry and scientific and academic institutions, as well as inter-Governmental organizations, to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument\instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention.

They also encouraged “Parties, Governments, international organizations and all relevant stakeholders to provide the ways and means to allow for sufficient preparation and to facilitate effective participation of indigenous and local communities in the process of the negotiation and elaboration of an international regime”.¹²³

¹²¹ See all the Meetings of the Conference of the Parties to the Convention on Biological Diversity; the Bonn Guidelines; WIPO “Examination of Issues Relating to the Interrelation of Access to Genetic Resources and Disclosure Requirements in Intellectual Property Rights Applications” (2005) Doc WIPO/IP/GR/05/01; and for a summarise see Graham Dutfield *Protecting Traditional Knowledge: Pathways to the Future* (International Centre for Trade and Sustainable Development (ICTSD, Genève, 2006).

¹²² Seventh Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity Decision VII/19 Access and benefit-sharing as related to genetic resources (Article 15) (Principle 1) electronic document <www.cbd.int/decision/cop/?id=7756>.

¹²³ COP 7 Decision VII/19 Access and benefit-sharing as related to genetic resources (Article 15) (Principle 6) electronic document <www.cbd.int/decision/cop/?id=7756>.

As Daes pointed out in her thorough research and report on indigenous peoples:¹²⁴

National laws should deny to any person or corporation the right to obtain patent, copyright or other legal protection for any element of indigenous peoples' heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the sharing of ownership, control, use and benefits (Principle 26).

In other words, indigenous peoples should be responsible for their own culture and resources and, as such, they should work with governments to find regulations that would safeguard the management and exploitation of the resources that are used by indigenous communities on a case by case basis and without discrimination.

In 2008 at the Ninth Session of the Conference of the Parties discussed provisions that should be incorporated within national and international regimes and summarised as:¹²⁵

- measures to ensure the fair and equitable sharing with traditional-knowledge holders of benefits arising out of the utilization of traditional knowledge in accordance with Article 8(j) of the Convention on Biological Diversity;
- measures to ensure that access to traditional knowledge takes place in accordance with community level procedures;
- measures to address the use of traditional knowledge in the context of benefit-sharing arrangements;
- identification of best practices to ensure respect for traditional knowledge in ABS related research;
- incorporation of traditional knowledge in development of model clauses for material transfer agreements;
- identification of individual or authority to grant access in accordance with community level procedures;

¹²⁴ Principles and Guidelines for the Protection of the Heritage of Indigenous People (UN – 1995).

¹²⁵ See Report of the Conference of the Parties to the Convention on Biological Diversity on the Work of Its Ninth Meeting (2008) UN Doc UNEP/CBD/COP/9/29 at 118 electronic document <www.cbd.int/doc/?meeting=cop-09>.

- access with approval of traditional-knowledge holders; and
- no engineered or coerced access to traditional knowledge.

On the same session, the COP came up with further considerations for other important elements to be included in international negotiations such as:¹²⁶

- prior informed consent of, and mutually agreed terms with, holders of traditional knowledge, including indigenous and local communities, when traditional knowledge is accessed;
- internationally developed guidelines to assist Parties in the development of their domestic legislation and policies;
- declaration to be made on the internationally recognized certificate as to whether there is any associated traditional knowledge and who the owners of traditional knowledge are; and
- community-level distribution of benefits arising out of traditional knowledge.

The considerations above show that there is a new trend that tries to encourage states and parties to international agreements to include consultations and prior informed consent and benefit-sharing to any discourse involving indigenous peoples' stakeholders and guardians of knowledge. One of the ways indigenous peoples have to secure benefit-sharing is through Contractual Agreements. Contracts, are legally binding documents between parties. In the case of indigenous TK, contracts cannot only strengthen the benefit-sharing paradigm, but can also guarantee the protection of secrets. In this case indigenous representatives would be able to determine:

- who the parties to the agreement are (guardians for example);

¹²⁶ "Components to be further elaborated with the aim of incorporating them in the international regime: 1 - Capacity-building measures at all relevant levels for: (a) Development of national legislation (b) Participation in negotiations, including contract negotiations (c) Information and communication technology (d) Development and use of valuation methods (e) Bioprospecting, associated research and taxonomic studies (f) Monitoring and enforcing compliance (g) Use of access and benefit-sharing for sustainable development; 2 - National capacity self-assessments to be used as a guideline for minimum capacity-building requirements; 3 - Measures for technology transfer and cooperation; 4 - Special capacity-building measures for indigenous and local communities; 5 - Development of menus of model clauses for potential inclusion in material transfer agreements" see Report of the Conference of the Parties to the Convention on Biological Diversity on the Work of its Ninth Meeting (2008) UN Doc UNEP/CBD/COP/9/29 at 118 electronic document <www.cbd.int/doc/?meeting=cop-09>.

- the duration of the agreement;
- what knowledge is included in the agreement;
- what use will be done with the knowledge;
- restrictions made on the use of the knowledge based on eg ethic, spiritual, moral reasons;
- specific restrictions based on confidentiality agreements annexed to the contract; and
- agreed specifics on the benefit-sharing.¹²⁷

Though the idea of using contracts might seem valuable and worth further exploring, it might only be limited to those indigenous peoples whose knowledge is expected to enter the public domain or about to enter it anyway and are looking for the best options to do so by safeguarding their interests; conversely, contracts are less suitable in the case of knowledge that is held secret and is controlled by very few within the community who have no legal education (or economic resources) on how to best protect their rights. In fact, there are often spiritual components in the specific TK of every community that cannot be discussed during a contractual transaction. Customary laws would prevent TK holders and guardians to do so. In addition to that, and as previously pointed out, much of the international debates stop at the border of a state in which governments and powerful stakeholders/multinationals are the ones who dictate whether to include indigenous peoples in any discourse relating to national and international economic negotiations and benefit-sharing.

Today as yesterday, there is a strong resistance to change a mindset which has been circulating for centuries that believes that the cultural, social and economic rights of indigenous peoples are debatable and often ignorable for the 'greater good'. Some might argue that granting exclusive rights and privileges to TK holders would be impractical and might, in the long run, undermine the creativity and have negative consequences for the economic development of a country. In the case of Wai 262, for example, the Crown speculated that "providing additional protection to taonga works might undermine creativity and

¹²⁷ For further information see Simon Brascoupé and Howard Mann *A Community Guide to Protecting Indigenous Knowledge* (Published under the authority of the Minister of Indian Affairs and Northern Development, Ottawa, 2001).

economic development”.¹²⁸ In the eyes of the Crown, taonga works and mātauranga Māori have been freely circulating in the public domain for too long to deserve any active protection through IP laws. What the Crown failed to explain is the ‘how’ and ‘why’ Māori culture has become part of the public domain. Was it consciously done by Māori people? Or was it rather the consequence of exploitation and discrimination?

What the law needs to address, in most of the cases involving indigenous peoples, is a fair deal or restorative justice that would not be needed if there was no abuse of power and discrimination to begin with. In this case, a nation cannot speak of the growth of its economy at the expenses of those who were never considered equal to the mainstream. On an opposite line, however, it is true that much of indigenous culture is today in the public domain. In that case, the traditional knowledge associated with genetic resources should be taken into account. In 2010 a supplementary agreement to the Convention on Biological Diversity was created specifically referring to the access and benefit sharing mechanism envisaged by the Convention. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity¹²⁹ provides “a transparent legal framework for the effective implementation of one of the three objectives of the CBD: the fair and equitable sharing of benefits arising out of the utilization of genetic resources”.¹³⁰ The Protocol covers TK, but only the one that is covered by the CBD. Any other knowledge or sacred/secret practice of indigenous peoples which finds no place in the CBD is not covered by the Protocol as well.

¹²⁸ Wai 262 - *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Vol I (The Waitangi Tribunal, Wellington, 2010) at 72 electronic document <www.waitangi-tribunal.govt.nz/reports/default.asp?type=wai&keywords=262> last visited on 14/01/2013.

¹²⁹ “The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity is a supplementary agreement to the Convention on Biological Diversity. It provides a transparent legal framework for the effective implementation of one of the three objectives of the CBD: the fair and equitable sharing of benefits arising out of the utilization of genetic resources. The Nagoya Protocol on ABS was adopted on 29 October 2010 in Nagoya, Japan and entered into force on 12 October 2014, 90 days after the deposit of the fiftieth instrument of ratification. Its objective is the fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and sustainable use of biodiversity” <www.cbd.int/abs/about/default.shtml>.

¹³⁰ For more details see electronic document <www.cbd.int/abs/about/default.shtml> last visited on 05/11/2014

In the case of TK which is in the public domain or it is not regarded as strictly secret, Article 5.5 of the Protocol states:

Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.

Article 7 adds that:

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.

However, as for the CBD, it is only if the Protocol is incorporated into domestic laws, that its provisions can have binding authority. This means that not much can be done in those countries that have not created legislation incorporating the CBD. Another important limitation is given by Art 16 (5) of the CBD that states that:

The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.

As the Report on Wai 262 specifies, any access and benefit sharing regime would be severely limited by Art 16(5) because it is subjected to private property rights.¹³¹ Compared to the general applications of the CBD, the TRIPS Agreement

¹³¹ ¹³¹ *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Vol 1 at 151.

presents a stronger enforcement mechanism which limits the force of Article 8 (j). In other words, the minimum IP standards set out in the TRIPS Agreement will take priority in every discourse concerning the access and benefit sharing rights involving kaitiaki/guardians or TK holders because access and benefit-sharing and prior-informed consent rights are at present unenforceable under CBD. The prevailing importance of the TRIPS can only be trumped in case:

The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. (Article 22 (1) of the CBD)).

9.5 - Trademarks, Certification Marks, Geographical Indications and their Inapplicability in Safeguarding the Intangible Sacred Knowledge Guarded by the Custodians

Over the years, IP law protecting distinctive signs (law of trademarks, collective marks, certification marks and geographical indications) has successfully safeguarded traditional signs, symbols and terms associated with indigenous peoples' TK and TCEs. Certification marks are official registrations that may be used by "anybody who complies with the standards defined by the owner of the certification mark". Collective marks, on the other hand, "may only be used by a specific group of enterprises, eg, members of an association";¹³² whereas trademarks are composed of distinctive signs "which identifies certain goods or services as those produced or provided by a specific person or enterprise. Its origin dates back to ancient times, when craftsmen reproduced their signatures,

¹³² "The Paris Convention contains provisions on collective marks in its Article 7bis. Those provisions, in particular, ensure that collective marks are to be admitted for registration and protection in countries other than the country where the association owning the collective mark has been established. This means that the fact that the said association has not been established in accordance with the law of the country where protection is sought is no reason for refusing such protection. On the other hand, the Convention expressly states the right of each member State to apply its own conditions of protection and to refuse protection if the collective mark is contrary to the public interest" see WIPO *Intellectual Property Handbook* (2004, reprinted 2008) at 69.

or ‘marks’ on their artistic or utilitarian products”.¹³³ Over the years, these marks have “evolved into today's system of trademark registration and protection. The system helps consumers identify and purchase a product or service because its nature and quality, indicated by its unique trademark, meets their needs”.¹³⁴ The Paris Convention for the Protection of Industrial Property and the revised editions deals with trademark and certification marks (from Art 6 to 10). However, every country has developed national legislation regulating trademarks, registration marks etc. Trademarks are symbols or signs that are associable to distinctive “words, phrases, symbols, designs, or any combination of these”¹³⁵ associated with a product. Article 15.1 of the TRIPS Agreement confirms that:

... any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

Trademarks can be extended indefinitely and are normally used to identify and differentiate products on the market.¹³⁶ The fact that trademarks can last forever and be held by a community or group of people could be convenient for indigenous peoples who hold knowledge communally. However, trademark law

¹³³ “Trademarks typically identify individual enterprises as the origin of marked goods or services. Some countries provide for the registration of collective and certification marks, which are used to indicate the affiliation of enterprises using the mark or which refer to identifiable standards met by the products for which a mark is used” supra at 69.

¹³⁴ See WIPO electronic document <www.wipo.int/trademarks/en/trademarks.html> last visited on 04/12/2012.

¹³⁵ Stephen A Hansen and Justin W VanFleet *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity* (American Association for the Advancement of Science - AAAS, Washington, 2003) at 20.

¹³⁶ “Being distinct means that the trademark does not resemble any other existing word, phrase, symbol, design, etc. associated with a similar product. Avoiding confusion as to the source of product is important for consumers purchasing these products. Trademarks distinguish products in order not to mislead consumers into thinking that a product is something that it is not or comes from another source”.

protects the symbol and the products represented by the symbol while it does not protect the knowledge or the technologies embracing the knowledge, least its holistic, sacred character. While trademarks could be effectively used by indigenous stakeholders who are presenting a new product on the market, in the case of the culture held by the guardians of spiritual knowledge (TK, TCEs and TMK), the protection of the knowledge often lies in its secrecy or limited circulation, therefore, it is quite inconvenient for indigenous peoples to suggest to make the knowledge public and create a sign that would represent it, or disclose the knowledge to unauthorized people in breach of the customary laws that prohibit its free circulation.¹³⁷ Trademarks can effectively be used by indigenous artists who create distinctive products that are not bound to secrecy within the community. According to WIPO, trademarks have always existed. Since time immemorial people have engraved symbols or signs to their creations (eg artworks, carvings).¹³⁸

In the Middle Ages, the flourishing of trade encouraged the introduction of distinctive signs to identify the goods of merchants and manufacturers. But it is during the industrialization time that trademarks started to play a central role “in the modern world of international trade and market-oriented economies”.¹³⁹ Today, trademarks can be used only by those TK holders who intend to bring their products to the public domain and intend to prevent the counterfeiting of their creations. Labels of Authenticity¹⁴⁰ have been, for example, used to identify

¹³⁷ Scholars often make the mistake of considering TK as something created by someone who had a brilliant idea in the art, medicine, resource management or similar. Or they might think that TK is just a knowledge that happens to be ‘also’ traditional. However, scholars often do not take into account that TK can present itself at different levels of secrecy: openly shared by everyone within a community; shared by a specific group with similar knowledge and skills (like healers and elders); or guarded by an exclusive group of people that has given proof of special attributes to be endorsed with the right and obligation of custody and transmission. Often very intense and secret rituals are performed to select these guardians of knowledge. Their duty has nothing to do with fixing ideas and knowledge somewhere or having it represented by a chosen symbol.

¹³⁸ For historical references on trademarks, see WIPO *Intellectual Property Handbook* (2004, reprinted 2008) at 67.

¹³⁹ See WIPO *supra* at 67.

¹⁴⁰ “In 1999, the National Indigenous Arts Advocacy Association (NIAAA) launched the ‘Label of Authenticity’ (‘Label’) which was designed to provide a national certification system for the authenticity of Indigenous art. The Label was used to show that goods or services were: ... derived from a work of art created by an Aboriginal or Torres Strait Islander person or people, [and] reproduced or produced and manufactured by Aboriginal or Torres Strait Islander people” ... “The NIAAA also established a second kind of label, the Collaboration Mark which was used to certify works which were the result of a collaboration in which an Aboriginal or Torres Strait Islander had a significant creative input with a non-Indigenous manufacturer or other collaborator under the terms of a fair agreement. The labels still have protection under the *Trade Mark Act 1995* (Cth). In part, the labels safeguard the property and economic rights of Indigenous creators.

works of Aboriginal artists. Similarly in Aotearoa/New Zealand the 'Toi Iho' Māori Made Mark¹⁴¹ has been created to protect the exclusivity of works of Māori artists (or of Māori descent). The creation of trademarks has been mostly justified in response to massive imitation of indigenous art that has invaded markets all over the world. And, in most cases, the marks referred to new or existing art that was already in the public domain. However, as stated above, not all indigenous art is supposed to be made public and, in the case of knowledge of limited dissemination and transmission, the creation of distinctive marks would imply the widespread distribution of indigenous cultures whose importance for the community resides in its secrecy, or limited circulation. Even when the marks are effectively representing a group of artists of indigenous affiliation or descent, the question arises whether the people who registered the mark are the same persons who created the artwork or the mark was created as a defensive mechanism to protect art and knowledge that had already entered the public domain? In this case, is the artist the person who benefit from the trademark, or is it rather the person who created the trademark? Arguably, the person who creates a trademark might, in fact, benefit from art that is already circulating. How? An indigenous entrepreneur might copy or use shared knowledge to create a distinctive sign from which he/she would be the only one to benefit. Third party's use of indigenous insignia is not unusual. Indigenous peoples and local communities around the world are increasingly fighting against third-party's use of indigenous and traditional marks (linked to a product or a service) which contains, in part or fully, their indigenous traditions and knowledge. In fact, trademarks are awarded on a first-to-use and first-to-register basis without much consideration on how long the knowledge or product has been circulating among indigenous communities. The fact that the product or service has not

They also reflect a recognition that consumers are keen to discriminate between 'rip-offs' and 'the real thing'. It was expected that buyers and traders would respond positively to the labels (as occurred with other labels such as the 'Woolmark' label which indicates that products are made from 100% Australian wool)" see electronic document <<http://ab-ed.boardofstudies.nsw.edu.au/go/aboriginal-art/protecting-australian-indigenous-art/background-information/protection-the-issues/the-label-of-authenticity-and-the-collaboration-mark>> last visited on 18/12/2012.

¹⁴¹ "Toi Iho Kaitiaki Incorporated is the entity instituted to advance the authenticity and quality of Māori arts under the auspices of the registered and globally recognised Toi Iho Māori trademark. Toi Iho is the te reo Māori name for the registered trademark" at <www.toiio.co.nz/> last visited on 18/12/2012.

The Toi Iho Maori trademark was launched in February 2002 under the NZ Government arts body: Creative New Zealand. Since October 2010, the Toi Iho Māori trademark has been administered by TIKI.

been registered yet is a sufficient condition for the awarding of trademarks.¹⁴² As Wong and Fernandini¹⁴³ rightly explain in their article, in states where indigenous peoples live there should be a better consideration of indigenous ‘cultural’ entitlement rights. They suggest that, in order to avoid registration of marks that are obviously of indigenous descent and attribution, states should implement in their national legislations selection criteria that contains the principle of “non-distinctiveness” of mark, and assessing whether the mark is in any way “misleading, deceitful, in bad faith, culturally offensive or scandalous”. In 2002, New Zealand introduced in their Trade Marks Act specific grounds for the refusal of marks that are obviously referring and incorporating Māori symbols and marks. Subpart 2 of Section 17.1 (c) reads:¹⁴⁴

The Commissioner must not register as a trade mark or part of a trade mark any matter — the use or registration of which would, in the opinion of the Commissioner, be likely to offend a significant section of the community, including Māori. ... A Māori Trade Mark Advisory Committee has been established under Section 177 of the Act to advise the Commissioner as to the likely offensiveness of trademarks containing Māori text and imagery to the Māori.

Wong and Fernandini suggest that there is a “greater level of objection” by Māori people in New Zealand than for many other indigenous peoples. The famous case *Pro-Football Inc. v. Harjo*¹⁴⁵ clearly demonstrates how difficult it can be to have a mark revoked on cultural offensive basis. The plaintiff requested the Trial Trademark and Appeal Board (‘TTAB’ or the ‘Board’) “to cancel six federal trademark registrations involving the professional football team, the Washington Redskins, because it found that the marks ‘may disparage’ Native Americans or ‘bring them into contempt, or disrepute’”.¹⁴⁶ Initially, the Court concluded that

¹⁴² For further detail see Tzen Wong and Claudia Fernandini “Traditional Cultural Expressions: Preservation and Innovation” in Tzen Wong and Graham Dutfield (eds) *Intellectual Property and Human Development* (Cambridge University Press, Cambridge, 2012) at 196-197.

¹⁴³ At 196-197

¹⁴⁴ At 196-197

¹⁴⁵ *Pro-Football Inc. v Harjo*, 50 USPQ 2d 1705, 1749 (TTAB 1999)

¹⁴⁶ “In September 1992, Suzan Shown Harjo and six other Native Americans (collectively, ‘Defendants’ or ‘Petitioners’) petitioned the TTAB to cancel the six trademarks, arguing that the use of the word ‘redskin(s)’

“in this case, as to the sufficiency of the evidence before the TTAB and the applicability of the laches defence, should *not* be interpreted as reflecting, one way or the other, this Court’s views as to whether the use of the term “Washington Redskins” may be disparaging to Native Americans”.¹⁴⁷ In 2015, District Court for Eastern District (of Virginia) Judge Gerald Lee affirmed the decision of the TTAB (July, 2015). Pro-Football Inc filed its appeal with USCA 4th Circuit on 30th October 2015 (decision pending).¹⁴⁸

Already in 2001, the United States Patent and Trade Mark Office (USPTO) had created a database of the “official insignia of all State and federally recognized Native American tribes which cannot be registered as trademarks”.¹⁴⁹ Arguably, trademarks and certification marks can work to safeguard indigenous insignia already disclosed in the public domain, and only if indigenous peoples act first to register them, winning over third party’s applications. On the other hand, not all indigenous peoples are aware of the fact that, to protect their symbology and culture, they can register it. In the worst-case scenario, they even might not have the economic resources to apply for registration. In this case, their chances to protect their knowledge drop considerably in the face of the wide resources of the stakeholders of developed countries. At the same time, indigenous symbols are often imbued with holistic, sacred importance and their representation is not only harmful for the community, but prohibited by the guardians who protect such knowledge.

Among all the IP regulations, geographical indications (GI)¹⁵⁰ differ significantly from trademarks and collective and certification marks. The Paris Convention

is ‘scandalous,’ ‘may . . . disparage’ Native Americans, and may cast Native Americans into ‘contempt, or disrepute’ in violation of section 2(a) of the Lanham Trademark Act of 1946 (‘Lanham Act’ or ‘Act’). Compl. 13 (citing 15 USC § 1052(a)). Pro-Football raised several affirmative defenses in the TTAB action. These included arguments that section 2(a) of the Lanham Act unconstitutionally impinges on First Amendment speech rights, that it also contravenes Fifth Amendment due process rights, and that the Petitioners’ challenge to the trademarks was barred by the equitable defense of laches” see *Pro-Football Inc. v Harjo*, 50 USPQ 2d 1705, 1749 (TTAB 1999) electronic document <www.oblon.com/sites/default/files/news/156.pdf>.

¹⁴⁷ Supra.

¹⁴⁸ See electronic document <<http://pdfserver.amlaw.com/nlj/Pro-Football%20opening%20brief.pdf>> last visited on 20/01/2016.

¹⁴⁹ Tzen Wong and Claudia Fernandini “Traditional Cultural Expressions: Preservation and Innovation” in Tzen Wong and Graham Dutfield (eds) *Intellectual Property and Human Development* (Cambridge University Press, Cambridge, 2012) at 198; see also the Trade-marks Act (Canada), Section 9 (1)(n)(iii).

¹⁵⁰ “The term ‘geographical indication’ has been chosen by WIPO to describe the subject matter of a new treaty for the international protection of names and symbols which indicate a certain geographical origin of a given product. In this connection, the term is intended to be used in its widest possible meaning. It embraces all existing means of protection of such names and symbols, regardless of whether they indicate

does not contain reference to the term of geographical indication as such, but mostly refers to appellation of origin in Art 1.2.¹⁵¹ WIPO makes a distinction between ‘indication of source’ and ‘appellation of origin’. In WIPO’s words:¹⁵²

... indication of source means any expression or sign used to indicate that a product or service originates in a country, a region or a specific place, whereas ‘appellation of origin’ means the geographical name of a country, region or specific place which serves to designate a product originating therein the characteristic qualities of which are due exclusively or essentially to the geographical environment, including natural or human factors or both natural and human factors.

Under the Lisbon Agreement appellation of origin is defined as “the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors” (Art 2.1). The idea of GI, on the other hand, was firstly introduced by the EC Council Regulation No 2081/92 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, Art 2.2(b)¹⁵³ (1992), and by Art 22.1¹⁵⁴ of the TRIPS Agreement in 1994. Like the certification marks, GI can “convey natural and human elements

that the qualities of a given product are due to its geographical origin (such as appellations of origin), or they merely indicate the place of origin of a product (such as indications of source). This definition also covers symbols, because geographical indications are not only constituted by names, such as the name of a town, a region or a country (‘direct geographical indications’), but may also consist of symbols. Such symbols may be capable of indicating the origin of goods without literally naming its place of origin” see *WIPO Intellectual Property Handbook* (2004, reprinted 2008) at 131.

¹⁵¹ Art 1.2: “The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition”.

¹⁵² *WIPO Intellectual Property Handbook* (2004, reprinted 2008) at 120.

¹⁵³ Geographical indication: means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

- originating in that region, specific place or country, and
- which possesses a specific quality, reputation or other characteristics attributable to that geographical origin and the production and/or processing and/or preparation of which take place in the defined geographical area.

¹⁵⁴ Art 22.1: “Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin”.

associated with a product”.¹⁵⁵ In international and national laws, GI serve four recognisable purposes:

- identify where the product is from (its source);
- indicate the unique qualities of a product;
- promote the product with a distinguishing name (for business purposes);
- and
- prevent infringement and unfair competition by establishing a legal basis for using a location name to avoid confusion with similar products.¹⁵⁶

Appellation of origin is a specific form of GI that specifies the quality of a product based on the geographical environment it was created or developed.¹⁵⁷ In some countries of the world, GI has been used to protect recognizable designs of the region originating them. In Peru, for example, Chulucanas have obtained GI for their ceramic designs. In general, in fact, GI and trademarks could be used by indigenous groups that have already developed characteristic knowledge and products associated to a specific territory or sign. However, as in most of the cases involving indigenous knowledge and Western IPR laws, associating a symbol or a region to a product of the mind means to bring it into the public domain. Moreover, in order to fit for the application criteria of trademarks and GI, the knowledge must be associated to a symbol/sign/mark or to a specific place. Like in the case of many textile designs in South America, it is often difficult to estimate where the design originated from, who developed it and who is therefore better entitled to use it under a specific certification of origin or

¹⁵⁵ For further detail see Tzen Wong and Claudia Fernandini “Traditional Cultural Expressions: Preservation and Innovation” in Tzen Wong and Graham Dutfield (eds) *Intellectual Property and Human Development* at 194.

¹⁵⁶ Art 22.1 TRIPS Agreement: “Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin”.

¹⁵⁷ Art 2 of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958) reads as: “(1) In this Agreement, ‘appellation of origin’ means the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors. (2) The country of origin is the country whose name, or the country in which is situated the region or locality whose name, constitutes the appellation of origin which has given the product its reputation”.

mark. On the other hand, similar textile designs can be found in different countries of South America without specific indication of which community or place developed them first. In the case of the knowledge held by the guardians or custodians, the situation becomes very delicate.

9.6 - Final Remarks

As stressed in previous parts of this thesis, the very existence and survival of indigenous knowledge resides in its limited circulation within the community and the public. The fact that the knowledge belongs to the whole community as part of its inheritance of the group, and regardless of how many people actually know it, is irrelevant. What is important is that most of the positive steps of protection suggested by WIPO expect that sensitive knowledge is put in the public domain to defeat any attempt to misappropriate it. In the eyes of WIPO and similar forums, the fact that some knowledge must remain unshared with everyone seems to be quite irrelevant. In addition to that, the licensing request of providing the documentary evidence of the relevant genetic material associated with TK and the certification of geographical origin during the patent application process, while interesting in theory, would require a revision of the TRIPS Agreement that, as of today, does not make the provision compulsory, and could consequently encourage the omission of the disclosure of the relevant TK. In fact, as Dutfield explains: “there is no particular reason for an examiner to suppose that a given invention is based on TK unless the applicant discloses the fact”.¹⁵⁸ In other words, only the public domain can judge if indigenous knowledge should enter it.

As the next chapter will prove, the public domain is not the only parameter by which indigenous secret knowledge can be judged. Secrecy itself can become a fundamental aspect of indigenous cultures to be used to protect them. As such, secrecy implies that some knowledge/information within a given community is restricted and guarded and that there is a mutual agreement within the group that the preservation of the knowledge is guaranteed by the limited knowledge

¹⁵⁸ Graham Dutfield *Intellectual Property Rights and Sustainable Development* UNCTAD - ICTSD Project on IPRs and Sustainable Development, International Trade & Sustainable Development Series No 4 (2003) at 3.

and circulation of it. Therefore, the next chapter will discuss how, in such a scenario, the law that has developed from the common law on confidentiality could today be used to safeguard indigenous secret knowledge.

Chapter 10

THE WAY AHEAD: Feasible ways to Safeguard Indigenous Peoples’ Secret Culture and Heritage

After many pages of exploration of the various areas of international law which can relate to indigenous peoples’ cultural issues and sacred/secret knowledge, we have seen how existing regulations fail, in one way or another, to guarantee the permanent safeguarding of indigenous peoples’ intangible culture as well as the rights of the custodians of such complex knowledge (religious, esoteric, biological, traditional and so forth) to carry on their duty of care undisturbed.

Although international law is moving in the direction of a serious consideration of indigenous peoples and their cultural rights, intangible cultural property remains today widely unprotected.

Cultural products “derive from ongoing expression and development of community symbols and practices and are thus neither new nor old, but in a sense both”.¹ In addition to that, such practices are often limited in accessibility and protected by custodians. International law, while fragmentally protecting portions of indigenous culture and knowledge, fails to refer to most of the hidden and sacred parts of indigenous cultures: the TK, TCEs and intangible heritage that is not in the public domain of the community because is too sacred to be shared with everyone. Such knowledge is also secret and needs strict and close protection by ‘special’ members of the community who have the ‘duty of care’ to maintain the knowledge uncorrupted. While recognising the importance of the kaitiaki and the knowledge in their custody, even the Wai 262 Report avoids any direct involvement with the knowledge that is mostly sacred and secret. The only recommendation that the Waitangi Tribunal came up with to protect such knowledge, whose intrinsic value and sacredness and secrecy

¹ See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Twenty-Eighth Session *The Protection of Traditional Knowledge: Draft Articles* (Genève, 2014) Doc WIPO/GRTKF/IC/28/5; Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Twenty-Seventh Session *The Protection of Traditional Knowledge: Draft Articles* (Genève, 2014) Doc WIPO/GRTKF/IC/27/4; Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (WIPO, 2015) electronic document <www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf> last visited on 01/11/2015.

represent its main key feature, is to keep it secret. Ideally, that would be the best advice to be given regarding such a delicate matter; however, in our technological time of mass consumption and exploitation, where a sacred dance can be recorded from a plane, and a very ancient healing remedy copied in short time, indigenous aspirations to be left free to manage their knowledge traditionally and holistically becomes unrealistic. Indigenous peoples need laws that can be enforced to prevent people from stealing, copying, and exploiting aspects of their cultures.

How can secret knowledge be kept secret? How can the law support the guardians' relationship to their knowledge? How much of that knowledge, if any, needs to be disclosed to be protected? What happens when the secret is revealed? Is there a law that can protect the knowledge that has remained secret? If not, can a law be created? If so, what would such a law be like?

This chapter will try to propose practical solutions to these delicate issues. It will try to do so in the total understanding and respect for indigenous cultures and traditions while, at the same time, contextualising such knowledge in our modern societies with their profound contradictions. Setting aside any idealistic discourse which would prove to be too impractical for societies that do not understand and practice holism, this thesis will suggest practical solutions that would guarantee more of a safeguard to indigenous peoples' cultures than the legal systems currently in place. The task is not an easy one. Much of the creation and implementation of such legal regimes, in fact, depends on the willingness of states to understand and accept the importance of protecting the traditional cultures of the world. On the other hand, indigenous peoples need to understand that the changes that so dramatically affect them have also been affecting the society at large. The world itself has changed and expecting staticity in the face of a fluctuating change (not necessarily an improvement) is unrealistic and would bring no real solutions to anyone who decides, for one reason or another, to keep the information in his/her custody secret or shared only among the few.

10.1 – Secrecy as Protection

This section will open with a short preamble: knowledge is information. Being tangible or intangible, any culture is composed of information that can be sacred or not, hidden or not, holistic or not. Any knowledge can be retained or shared. And when it is shared it becomes information. The same thing happens when knowledge is stolen or introduced in the public domain without formal consent by the holder.

We live in a world of intersected contextualised information. For simplicity, from now on the words knowledge, culture and information will be used interchangeably. In this context, information will be understood as included within knowledge and culture and embodying both tangible and intangible characteristics.² The *New Shorter Oxford Dictionary* (1993) defines ‘information’ as:³

- communication of the knowledge of some fact or occurrence;
- knowledge or facts communicated about a particular subject, event, etc; intelligence, news; and
- without necessary relation to a recipient: that which inheres in or is represented by a particular arrangement, sequence, or set, that may be stored in, transferred by, and responded to by inanimate things

Indigenous peoples possess a vast array of knowledge and information which, like in most of the cultures of the world, hold different meaning and importance within each community.⁴ Much of this knowledge is kept secret and managed by selected custodians and the very existence of such knowledge is justified by the

² “Culture being composed of knowledge and information. Knowledge being what humans know and information being composed of data that expand our knowledge and consequently our culture” see Anthony Liew “Understanding Data, Information, Knowledge And Their Inter-Relationships” (2007) 8 2 *Journal of Knowledge Management Practice* electronic document <www.tlinc.com/articl134.htm> last visited on 10/11/2015.

³ Lesley Brown (ed) *The New Shorter Oxford English Dictionary* (Oxford University Press, New York, 1993).

⁴ As repeated in previous chapters, intangible, sacred knowledge is often composed of information that is meant to be secret or shared by very few people within the community. The fact that such knowledge is held and guarded by guardians is a confirmation of the limitation imposed to the accessibility of such information. Such practices involve a great deal of confidentiality among the small group of people who can access specific, sensitive information. Though conceptually sacred/secret knowledge can be held by only one person, within indigenous communities, knowledge has a functional characteristic and is often shared among restricted groups of designated people.

way in which information is meant to be used according to traditions and customs. While it is true that the repercussions deriving from sharing restricted information might not have the same legal implications among indigenous peoples that they have in Western societies (although indigenous customary laws often function as effective enforceable legal systems), the rationale behind the limitation of secret, confidential information is very similar to the one present in the common laws adopted by British and British-derived legal systems such as United States, Canada, Australia and New Zealand.

Common Law⁵ on confidentiality is based on the common sense of the “reasonable person”,⁶ the “person of average intelligence and honesty”,⁷ the “reasonable person of ordinary sensibilities”⁸ or the “sensibilities of a reasonable person placed in the situation of the subject of the disclosure”.⁹ Maybe, in general, common law does not possess the esoteric implications that secret/confidential information has within the holistic traditions of indigenous peoples, but it shares the same moral and ethical principles that something known and shared in confidential circumstances should not be disclosed to third parties. Although every civilization might regard culture and secrecy differently, the principles of common sense that regard secrecy as something that cannot belong to everyone, are often universal and universally understood. Of course, the specific cultural underpinnings of different legal systems influence the relevancy of the information in different ways that are reflective of the milieu in which they were developed; however, the universal traits that make certain information secret and confidential remain fundamentally similar.¹⁰ The idea is to value some information to the point to ensure that the knowledge is protected by limiting its circulation. The reasons to expect such limitations can

⁵ For readings on the Common Law, see Theodore FT Pluknett *A Concise History of the Common Law* (Liberty Fund, Inc, Indianapolis, 1956); Oliver Wendell Holmes *The Common Law* (United States, 2014).

⁶ “It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence” see *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 48 (Megarry J).

⁷ *Printers & Finishers Ltd v Holloway* [1965] RPC 239, 257 (Cross J).

⁸ *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] 208 CLR 199, [42] (Gleeson CJ); *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [94] (Lord Hope).

⁹ *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at 136 (Baroness Hale).

¹⁰ See WIPO Glossaries electronic documents

<www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_23/wipo_grtkf_ic_23_inf_8.pdf> and <www.wipo.int/tk/en/resources/glossary.html#45> last visited on 10/11/2015.

be varied: economic, spiritual, personal and, in general, culturally sensitive for one reason or another. Every civilization might protect such secrecy in ways that worked best for them. However, past isolation that maintained those traditions in place are today, in the era of mass communication, threatened at unprecedented pace.

As it will be seen in the next pages, although the information needs to possess a level of 'objective' sensitivity to justify its confidential constraint for any judge called in to assess any breach of confidentiality agreement, the assessment of the 'sensitivity requirement' can be purely personal and subjective. The law of breach of confidence protects any confidence that has been exchanged in a confidential context and with the intent to remain secret. The next pages will show how, at the end of the 19th century, the law related to confidential information took different directions. In the United States it became privacy law (trade secret law, for example, is today statutorily completely distinct from privacy law), while in the nations of the Commonwealth, where the British tradition could develop more harmoniously, confidentiality remained a distinct concept inclusive of anything that could be rightly regarded as confidential (trade secrets included). And yet, before exploring the above sentence in more detail, it is necessary to shed some light on another important aspect of confidential/secret information/knowledge that is crucial to the understanding of any further argument: according to any national and international laws, any information, regardless of its content, or the sensitive importance it holds for the holder, does not constitute 'property'. While it is not the aim of this thesis to enter into any debate on why all information does not constitute property, the next section will try to briefly explain how, as of today, information cannot be regarded as property, although the term property is often present in the language used for laws protecting information. This parenthesis is important to remove confusion and, at the same time, exclude from any further analysis any discourse on private property. It follows that if indigenous knowledge is not property, because no information constitutes property, then property laws cannot be used to safeguard indigenous cultures. As it has been pointed out in previous chapters, the argument quite happily marries the holistic understanding

that indigenous peoples have of their culture. The guardians themselves do not believe they own the knowledge/information they safeguard, because nothing in the realm of nature and spirit can be owned. They are the keepers of passed-down knowledge. Their 'special' role does not entail ownership, but preservation and management of the knowledge they have received. For once, the indigenous and Western worlds agree on something, although for very different reasons.

10.2 - No Property Rights Over Information and Knowledge

Private property is one of the primary interests that any legal system aims to protect. Up until now, the nature of ideas and information, although confusingly questioned in many cases of the 19th century, have not been recognised as property by the law.¹¹ According to Cornish, traditionally notions of private property have evolved around tangible things – land and movables;¹² whereas ideas and information have found protection under intellectual property laws, which use the word 'property' in their language but do not consider information as private property. Thus, although information finds protection under intellectual 'property' laws, the reference to information, and more specifically confidential information, as 'property' is considered purely metaphorical. When the courts describe a confider's right as proprietary in context, they actually refer such a 'convenient term' to apply to the confider's right as existing in equity or

¹¹ According to Robert Dean: the uncertainty surrounding the question "Is confidential information property?" arose for a number of reasons: 1- Early cases. Courts in the 18th and 19th centuries showed considerable ingenuity in the use of property as the basis of their decisions (*Prince Albert v Strange* [1848] 2 De G & Sm 652 at 694; 64 ER 293 at 311; *Millar v Taylor* [1769] 4 Burr 2303 at 2340; 98 ER 201 at 221. See Lord Coleridge in *R v Ramsay and Foote* [1883] 48 LT 733 at 735) including to protect secret information either as equity under the guise of common law or pursuant to common law copyright prior to the Copyright Act 1911UK; 2 – Propertiness of information. Secret information, particularly trade secret, exhibit many of the characteristics of property. It can be monopolised, bought and sold, constitute a valuable asset and, while confidential, can be 'owned' by individuals. As the value and demand for technology has increased, so has pressure to turn an equitable obligation into property; 3 – The term 'property'. Because of its 'property-like' characteristics, there are repeated references to information as 'property' but in a metaphorical sense meaning 'ownership'. It is easy to lose sight of the fact that what is at stake is an obligation and not the information per se; 4 – Espionage, finder and Third party. Equity has found it difficult to deal with the situations where, although the misuse of secret information is unconscionable, there is no communication of the information creating an obligation of confidence, or no relationship creating a fiduciary or contractual obligation. Examples include the innocent third party, the surreptitious thief, or the lucky finder ..." see Robert Dean *The Law of Trade Secrets and Personal Secrets* (2nd ed, Lawbook Co., Sydney, 2002) at para 2.120.

¹² W Cornish and D Llewelyn *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (Sweet & Maxwell, London, 2007) at 37.

contract.¹³ The limited scope of the term conveniently used for information that is of a confidential nature has been clearly described by Justice Holmes in a famous statement:¹⁴

The word property as applied to ... trade secrets is an unanalysed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be. Therefore the starting point for the present matter is not property ... but that the defendant stood in confidential relations with the plaintiffs, or one of them.

In *Gurry* it is specified that the term ‘property’ is not used in “its normal sense as conferring an exclusive right which operates against the whole world”.¹⁵ The text recognises that in early cases of the 18th and 19th centuries the word ‘property’ as applied to information was naively used as the basis of some courts’ decisions.¹⁶ In those British cases secret information could find protection either through equity under the guise of common law,¹⁷ or pursuant to the common law of copyright as it was conceived by common law prior to the Copyright Act (1911).¹⁸ However, the evolution of information into property was never effective. Stanley writes¹⁹ that it is clear that, under English law, information is not property. In fact, English law “does not impose duties upon people with respect to confidential information because it recognises some particular

¹³ Tanya Aplin, Lionel Bently and others *Gurry on Breach of Confidence* (2nd ed, Oxford University Press, Oxford and New York, 2014) at para 4.7.

¹⁴ *El Du Pont De Nemours Powder Company Et Al v Masland Ee Al* [1917] 244 US 100, 61 L Ed 1016, 37 S Ct 575.

¹⁵ *Gurry on Breach of Confidence* at para 4.71.

¹⁶ See *Prince Albert v Strange* [1848] 2 De G & Sm 652 at 694; 64 ER 293 at 311; *Millar v Taylor* [1769] 4 Burr 2303 at 2340, 98 ER 201 at 221. See also Lord Coleridge in *R v Ramsay and Foote* [1883] 48 LT 733 at 735.

¹⁷ *Deta Nominees Pty v Viscount Plastic Products Pty Ltd* [1979] VR 167.

¹⁸ “The Copyright Act 1911, is known as the Imperial Copyright Act of 1911. It is an Act of the Parliament of the United Kingdom that established copyright law in the UK and the British Empire. The Act amended existing copyright law as recommended by the Royal Commission in 1878 and repealed all previous copyright legislation that had been in force in the UK. The act also implemented changes arising from the first revision of the Berne Convention for the Protection of Literary and Artistic Works entered into force in 1908” electronic document <www.legislation.gov.uk/ukpga/Geo5/1-2/46/enacted> last visited on 22/04/2015.

¹⁹ Paul Stanley *The Law of Confidentiality: A Restatement* (Hart Publishing, Oxford and Portland-Oregon, 2008).

relationship between claimant and the information (a right, as it were, *in rem*) which requires protection against strangers. Rather, it imposes duties between individuals (rights *in personam*) whose consequence is to protect information”.²⁰ Conversely, according to Dean, secret/confidential information (particularly trade secrets)²¹ presents many of the characteristics of property: it can be monopolised, bought and sold; it can constitute a valuable asset and while it is of confidential nature, can be ‘owned by individuals’.²² However, he agrees with the authors of *Gurry* and current law that the reference to secret information as property is and remains fundamentally metaphorical.²³ In fact, in confidential/secret information/knowledge what is protectable is the obligation and not the information per se. For secret information to be property, all information should be considered property; and judges have firmly rejected such a possibility. Although some scholars have commented that secret information is of a different nature compared to more general information, courts have rejected the possibility of considering secret information as property.²⁴

²⁰ “Despite occasional wobbles or confusion, this has been a fairly consistent theme: the equitable duty of confidence is not equivalent to a right *in rem* or *erga omnes* – but is a right which exists between people” see Stanley *supra* at 149.

²¹ Hill warns against the arguably untoward inflationary dynamic inherent in the rhetoric of property by saying: “The judicial tendency to classify trade secrets, and ideas generally, as property has its philosophical dangers. One such danger is that judges may be invoking the notion of ‘value as property’. Critics including Felix Cohen have pointed out that the theoretical underpinning of many decisions is the following analysis: X has ‘created a thing of value; a thing of value is property; X, the creator of property, is entitled to protection against third parties who seek to deprive him of his property’. Justice Oliver Wendell Holmes was apparently concerned about this equation of value with property. In *International News Service v Associated Press* the Court ruled that the news was ‘quasi-property’ and enjoined the defendant from copying further news stories from the plaintiff. In his concurrence, Justice Holmes disagreed with this property conception by the Court, stating that ‘property, a creation of law, does not arise from value, although exchangeable’, and that the existence of exchangeable value is a matter of fact, rather than law. In other words, if a thing has value, that is a fact, but there is no automatic requirement that the law protect that thing as property. One problem with giving property status to everything it can lead to social paralysis. As Felix Cohen first observed, another problem is that the ‘property from value’ approach can be circular: the approach ‘purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected’” see James Hill “Trade Secrets, Unjust Enrichment, and the Classification of Obligations” (1999) 4 *Virginia Journal of Law and Technology* 2 at 25.

²² Robert Dean *The Law of Trade Secrets and Personal Secrets* at para 2.120.

²³ “Many of the references to property in 20th Century cases concerning secret information can be attributed to the metaphorical use of the word property to mean ownership (*Prebble v Reeves* [1910] VLR 88 at 103; *Lamb v Evans* [1893] 1 Ch 218; *Shallcross v Oldham* [1862] 2 J & H 6090; 70 ER 1202). But in other cases, the reference is more direct such as ‘a proprietary interest in information’ (*G D Searle & Co Ltd v Celltech Ltd* [1982] FSR 92 at 105; *Yates Circuit Foil Co v Electrofoils Ltd* [1976] FSR 345 at 384; *Deta Nominees Pty v Viscount Plastic Products Pty Ltd* [1979] VR 167 at 191). In some cases reference to the plaintiff’s rights suggests a property analysis (*Franklin v Gidding* [1978] Qd R 72, 81; *Saltman Engineering Co v Campbell Engineering Co* [1948] 65 RPC 203)” see Dean *supra*.

²⁴ See *Federal Commissioner of Taxation v United Aircraft Corporation* [1943] 68 CRL 525 at 534; see also Dean *supra* at para 2.125.

On a different line of thought, scholars like Lemley argue that intellectual property is simply another species of real property rather than “a unique form of legal protection designed to deal with the public goods problem”.²⁵ In his broad experience, Bently reiterates that confidential information, as any information which has necessarily no secrecy element within itself, should not be classified as property. Even if from the 1980s confidential information has been classified as part of intellectual property law, it remains excluded from any property right as such. Confidential information is part of intellectual property but it is not property.²⁶ The reasons that Bently uses to reconfirm that are quite straightforward: “information is not easily demarcated or defined”; “confidentiality does not confer exclusivity”; “confidential information can easily be disseminated” and “it is frequently shared in ways that are difficult to describe in terms of ownership”.²⁷ However, Bently leaves space for a possible evolution of confidential information. He recognises that most of the debates over confidential information happened within a common law system, which is not representative of a multicultural legal system (such as countries with civil law traditions for example) and does not consider the complexity of other legal systems that evolved outside the common law regime. Because the debate as to whether confidential information could be considered ‘property’ has been carried on mostly by jurists within the common law system, the legislative development involving statutory obligations of confidence were consequently dismissed. In other words, although information is today considered constituting part of intellectual property, but it is not ‘property’, it does not mean that it will never be.²⁸ In a multicultural world where different law regimes are supposed to co-exist, the future of confidential information is still open to further evolution.

²⁵ “This fundamental principle is under sustained attack. ... They rely on the economic theory of real property, with its focus on the creation of strong rights in order to prevent congestion and overuse and to internalize externalities. They rely on the law of real property, with its strong right of exclusion. And they rely on the rhetoric of real property, with its condemnation of ‘free riding’ by those who imitate or compete with intellectual property owners. The result is a legal regime for intellectual property that increasingly looks like the law of real property, or more properly an idealized construct of that law, one in which courts seek out and punish virtually any use of an intellectual property right by another” see Mark Lemley “Property, Intellectual Property, and Free Riding” (2004-05) 83 *Texas Law Review* 1031 at 1031-1032

²⁶ Lionel Bently “Trade Secrets ‘Intellectual Property’ but not ‘Property’?” in Helena R Howe and Jonathan Griffiths (eds) *Concept of Property in Intellectual Property Law* (Cambridge University Press, Cambridge, 2013) at 61.

²⁷ See Bently *supra* at 80; see Gurry at 312, para 8.03.

²⁸ See Bently *supra* at 88.

As Keene L J has pointed out:²⁹ “breach of confidence is a developing area of the law, the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice”. In fact, although the debate on confidential information as ‘property’ is a very complex and fascinating topic, it is not the intention of the thesis to explore in detail the current debate on why secret and confidential information cannot be considered ‘property’ by the law. Therefore, the thesis acknowledges that there is a growing resistance to applying the traditional dictum that secret information is not property, and rising concerns among scholars seem to push in the direction of a revision of such dictum to include secret information into the conundrum of property. Because such change has not taken place yet, the thesis remains on the current line of the general rules of law applicable to confidential information.³⁰ Having said this, it is important to point out that, in order to be protected, secret/confidential information does not have to be considered property. This means that the debate over confidential information as property is not strictly relevant to further arguments on secret knowledge as confidential information. Nonetheless several questions arise: What does Western law consider secret/confidential information? How can indigenous secret knowledge fit within the realm of confidential information laws?

The next pages will attempt to demonstrate that not only can indigenous sacred/secret knowledge constitute confidential information, but it can be protected under Western legal systems on confidentiality. To answer those questions effectively, it is important first to broadly define secret/confidential information and then demonstrate how it fits within the law on confidentiality information. In order to discuss that, it is also important to take into consideration the fact that the laws regulating the flow of sensitive, confidential

²⁹ *Douglas v Halo* [2001] QB 967, 1011 (CA), [165], [2001] *EMLR* 199 at 251; this trend has also been identified and endorsed by Judge Easterbrook, who writes: “Patents give a right to exclude, just as the law of trespass does with real property. Intellectual property is intangible, but the right to exclude is no different in principle from General Motors’ right to exclude Ford from using its assembly line. ... Old rhetoric about intellectual property equating to monopoly seemed to have vanished [at the Supreme Court], replaced by a recognition that a right to exclude in intellectual property is no different in principle from the right to exclude in physical property ... Except in the rarest case, we should treat intellectual and physical property identically in the law – which is where the broader currents are taking us” see Frank H Easterbrook “Intellectual Property is Still Property” (1990) 13 *Harv JL and Pub Policy* 108.

³⁰ For further reading on the subject see Tanya Aplin, Lionel Bently and others *Gurru on Breach of Confidence* (2nd ed, Oxford University Press, Oxford and New York, 2014).

information, in the last century, have taken different routes. While British and British-derived laws have reinforced the law on confidentiality, the United States judicial system has taken a different path by considering secret/confidential information as something personal and private and, therefore, preferably protected by privacy law. The next sections will explain why this has occurred, how it has affected the protection of confidential information and how it might make a difference for indigenous guardians of knowledge.

10.3 – Secret Knowledge as Confidential Information: British v American Law – Different Laws but Same Purposes

The history of Breach of Confidence is obscure. There are no existing books or articles on the matter before the nineteenth century. However, history and practice trace the action for breach of confidence back to the 16th century,³¹ when “in speaking about the general jurisdiction of the Court of Chancery (or conscience), Sir Thomas More said that ‘three things are to be helped in conscience, Fraud, Accident and things of Confidence’”.³² History, in fact, shows that the British Courts were initially willing to protect confidentiality by whatever mechanism they had then at hand (eg common law on copyright, implied or express contracts, criminal law, trade and commercial secrets).³³ At the time, the Law protected confidential information before ever existed an “action for” or an “equitable tort” of breach of confidence.³⁴ It was after the Second World War that the law on breach of confidence as a *sui generis* action independent of contracts arose with its capacity to regulate non-contractual situations.³⁵ Today it is widely known that the tort of breach of confidence is a common law tort that protects private information that is conveyed in confidence. A claim for breach of confidence typically requires the information to be of a confidential nature, to be communicated in confidence, and consequently disclosed to the detriment of the

³¹ “The equitable jurisdiction in cases of breach of confidence is ancient: confidence is the cousin of trust. The Statute of Users, 1535, is framed in terms of ‘use confidence or trust’” see *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 High Court – Chancery (England) – 1 July 1968 at 46.

³² See Bently at 1138.

³³ See Gurry at 13.

³⁴ Gurry at 13.

³⁵ Gurry at 13.

claimant. According to Cornish:³⁶ “the jurisdiction to restrain breach of confidence has its roots in equity, partly because the remedy most often sought has been the injunction, and partly because the subject-matter occupies the same moral terrain as breach of trust”.

Indeed, long ago it was established that equity will enforce obligations between persons which had been in a relationship of confidence with each other. If in the framework of a confidential relationship, A communicated information to B on terms that B would keep the information secret, equity would intervene to require B to comply with his obligations.³⁷ As such, equity would enforce obligations that were consensually assumed between the parties. In that case, the requirement of confidentiality applied whether the courts relied on independent jurisdiction in equity, or on the implied terms of a contract, or on the right of property in information.³⁸ Additionally, in case B shared the information with C and although C had no apparent obligation toward A, if C knew that the information was something that B had agreed to keep confidential, equity would impose a similar obligation upon C.³⁹

By the end of the 19th century, “a robust body of confidentiality law protecting private information from disclosure existed throughout the Anglo-American common law”.⁴⁰ Traditionally, confidentiality focuses on relationships. Its main purpose is, in fact, to restrain others from revealing private information to individuals who are not authorized to receive the information. The legal framework of modern breach of confidence was set by the cases *Prince Albert v Strange*⁴¹ and *Morison v Moat*.⁴² In *Albert v Strange* (1849)⁴³ the High Court of

³⁶ W Cornish and D Llewelyn *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (Sweet and Maxwell, London, 2007) at 311; “Equity may impose obligations of confidentiality even though there is no importing of information in circumstances of trust and confidence. Attempts to describe the circumstances when equity will act are sometimes couched in terms of the nature of the conduct, which is variably described as surreptitious, improper or unconscionable, or the reasonable man who would see the information as ‘obviously confidential’” see *ABC v Lenah Game Meats Pty Ltd* [2001] 76 ALJR 1 at 9 and *Attorney-General v Guardian Newspapers Ltd* [1988] Ch 333 at 358.

³⁷ Paul Stanley *The Law of Confidentiality: A Restatement* (Hart Publishing, Oxford and Portland-Oregon, 2008) at 3.

³⁸ See *Gurry* at para 5.0.

³⁹ See Stanley at 3.

⁴⁰ Neil M Richards and Daniel J Solove “Privacy’s Other Path: Recovering the Law of Confidentiality” (2007) 96 *Georgetown Law Review* 123 at 125.

⁴¹ *Prince Albert v Strange* [1849] 47 ER 1302.

⁴² *Morison v Moat* [1851] 9 Hare 241; [1851] EngR 790; [1851] 68 ER 492 20 Aug 1851.

⁴³ The Prince sought to restrain publication of otherwise unpublished private etchings and lists of works by Queen Victoria. The etchings appeared to have been removed surreptitiously from or by one Brown. A

Chancery awarded Prince Albert an injunction restraining Strange from publishing a catalogue describing Prince Albert's etchings. Lord Cottenham noted that "this case by no means depends solely upon the question of property, for a breach of trust, confidence, or contract, would of itself entitle the plaintiff to an injunction".⁴⁴ In these early cases it remained an essential basis for the equitable action for breach of confidence the fact that the information presented the necessary quality of confidence, that it had been imparted in circumstances importing an obligation of confidence of which the defendant was aware, or was to be taken as having been aware of that.⁴⁵ In the United States, at the end of the nineteenth century, in considering the confidentiality case *Albert v Strange*, two lawyers, Samuel Warren and Louis Brandeis, discussed confidentiality in an article – "The Right to Privacy" (1890)⁴⁶ – that became history and set the foundation for privacy law in the United States.

It is generally correct to assert that the history surrounding the birth of the law of breach of confidence has been uncertain; while modern scholars seem to agree that the action is an application of a broader notion of good faith⁴⁷ derived from relationships. In other words, confidentiality recognises that "nondisclosure expectations emerge not only from norms of individual dignity, but also from norms of relationships, trust, and reliance on promises".⁴⁸

personal confidence was claimed. Held: The jurisdiction in confidence is based not so much on property or on contract as on a duty of good faith. In granting an injunction restraining the publication of the catalogue containing descriptions of etchings, the court said it was 'an intrusion – an unbecoming and unseemly intrusion. . .offensive to that inbred sense of propriety natural to every man – if, intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life – into the home (a word hitherto sacred among us).' The plaintiff's affidavits: 'state distinctly the belief of the Plaintiff, that the catalogue and the descriptive and other remarks therein contained, could not have been compiled or made, except by means of the possession of the several impressions of the said etchings surreptitiously and improperly obtained. To this case no answer is made. . . If then, these compositions were kept private, except as to some. . . sent to [B] for the purposes of having certain impressions taken, the possession of the Defendant . . . must have originated in a breach of trust, confidence, or contract, in [B] or some person in his employ taking more impressions than were ordered, and retaining the extra number.' Lord Cottenham LC said: 'privacy is the right invaded.' *Prince Albert v Strange* [1848] 2 De G & Sm 652.

⁴⁴ *Prince Albert v Strange* [1848] 2 De G & Sm 652.

⁴⁵ Paul Stanley *The Law of Confidentiality: A Restatement* (Hart Publishing, Oxford and Portland-Oregon, 2008) at 4.

⁴⁶ Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 *Harvard Law Review* 193 at 195.

⁴⁷ See *Seager v Copydex* (No 1) [1967] 2 All ER 415.

⁴⁸ Neil M Richards and Daniel J Solove "Privacy's Other Path: Recovering the Law of Confidentiality" (2007) 96 *Georgetown Law Review* 123 at 126.

It is not necessary that the parties are in any legal relationship at the time when the obligation of confidentiality arose.⁴⁹ With their article Warren and Brandeis focussed on individual dignity and pointed American common law on confidentiality in a new direction: focusing on the general protection of 'inviolate personality' against any invasion by strangers. The article had, and still has, such an impact in American law that, in 2001, the Supreme Court in *Kyllo v United States*⁵⁰ cited Warren and Brandeis' words by the majority both in concurrence and dissent. At the time of the publication, the importance of the article rested in its asserted request for the development of a law that would protect a person's feelings, emotional life and his right to be let alone. In their article, Warren and Brandeis, inter alia, underlined that there was no existing law for injury of personal feelings that resulted from insult and violation of someone's honour. In that regard they wrote that:⁵¹

... our law recognizes no principle upon which compensation can be granted for mere injury to the feelings. However painful the mental effects upon another of an act, though purely wanton or even malicious, yet if the act itself is otherwise lawful, the suffering inflicted is *damnum absque injuria* (loss or harm from something other than a wrongful act which occasions no legal remedy). Injury of feelings may indeed be taken account of in ascertaining the amount of damages when attending what is recognized as a legal injury; but our system, unlike the Roman law, does not afford a remedy even for mental suffering which results

⁴⁹ "Whether as a consequence of a confidential communication a limited fiduciary relationship arises or an independent obligation of confidence is established is a matter of semantics. What is certain is that the confidential communication of the information creates an equitable obligation of good faith towards the confidor; an obligation which equity will enforce, not to use or disclose the communicated information except in accordance with the wishes of the confidor. However the notion of confidence goes beyond the communication of information in a fiduciary relationship. In recent years the doctrine has continued to grow and develop 'at an ever increasing rate of progress as new cases, arising under new conditions of society, of applied science and public opinion have presented themselves' (see *Douglas v Hello Ltd* [2000] 2 WLR 992 at 1016), and it is now clear that where information is secret and is obtained in 'unconscionable' circumstances or circumstances affecting the conscience of the reasonable recipient, equity will intervene on the basis of breach of confidence" see Robert Dean *The Law of Trade Secrets and Personal Secrets* at 65.

⁵⁰ *Kyllo v United States* [2001] 533 US 27.

⁵¹ They carry on by saying that "it is not however necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration" see Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 *Harvard Law Review* 193.

from mere contumely and insult, from an intentional and unwarranted violation of the 'honor' of another.

According to Warren and Brandeis, the protection that should be afforded to thoughts, sentiments and emotions "expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the more general right of the individual to be let alone".⁵² Their intent was to protect the privacy of life. Later on, with his article "Privacy" (1960), William Prosser⁵³ 'cemented' the direction taken by Warren and Brandeis. Not only did he establish the American privacy law and its four related torts but, at the same time, he minimised the importance of confidentiality in the United States. The four torts that had emerged with Prosser are:⁵⁴

- intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
- public disclosure of embarrassing private facts about the plaintiff;
- publicity that places the plaintiff in a false light in the public eye; and
- appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Prosser excluded the emerging American tort of breach of confidentiality from the four torts on privacy.⁵⁵ In fact, by the 1960s a group of cases, distinct from those related to privacy, had recognised a distinct tort for breach of confidentiality or breaches of express or implied contracts against nondisclosure.⁵⁶ According to Beverlley-Smith and others, Prosser's third tort – publicity placing a person in a false light – also "protects an interest in reputation and is very closely related to the tort of defamation, although it goes beyond the bounds of the tort of defamation in protecting sensibilities or feelings rather

⁵² Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890).

⁵³ William L Prosser "Privacy" (1960) 48 *California Law Review* 383.

⁵⁴ *Supra* at 383.

⁵⁵ "First the intrusion tort protected a primary mental interest that had been useful in filling out the gaps left by trespass, nuisance and the intentional infliction of mental distress. Second, both the disclosure tort and the false light tort protected an interest in reputation, with the same overtones of mental distress that are present in defamation. Third, the appropriation tort protected "not so much a mental as a proprietary [interest] in the exclusive use of the plaintiff's name and likeness as an aspect of his identity" see Prosser at 406 and Huw Beverlley-Smith, Ansgar Ohly and others *Privacy, Property and Personality* (Cambridge University Press, Cambridge, 2006) at 55.

⁵⁶ *Bazemore v Savannah Hospital* 155 SE 194 (Ga. 1930); *Douglas v Stoke* SW 849 (Ky 1912); *Smith v Driscoll* 162 P. 572 (Wash 1917); *McCreery v Miller's Groceteria Co* 64 P2d 803, 805 (Colo 1937).

than reputation *stricto sensu*”⁵⁷. The initial intent of Warren and Brandeis was to consider those tort laws that were covering cases where the harm was emotionally based. According to Richards and Solove,⁵⁸ strictly speaking, Warren and Brandeis did not give birth to the right of privacy but “shifted its conceptual underpinning away from confidentiality and toward what they called ‘inviolate personality’”.⁵⁹ By the 1890s, a growing body of law had already developed to protect privacy as part of confidentiality. The only thing that Warren and Brandeis did was to bring recognition to this body of law while, at the same time, attempting to “steer the law toward protecting what they believed to be a broader conception of privacy”:⁶⁰ including the right to be let alone – which is based on the protection of human dignity or inviolate personality.⁶¹ In other words, the protection of privacy law extends to a “person’s control over access to information about himself; a person’s limited accessibility to others; and autonomy or control over the intimacies of personal identity”.⁶² On analysing the *Albert v Strange*⁶³ case, Warren and Brandeis acknowledged that, although the Chancellor had recognised a common law literary property right in unpublished work similar to the common law of copyright in unpublished works, the Courts of the time were still too focussed on remedying injuries to property, such as lost profit, to consider the “mere injury to the feelings” that can accompany the publication of private facts about individuals.⁶⁴ Thus, the difference between confidentiality and privacy law is that the first protects information from disclosure in the context of relationships, while the second claims a right against the world to protect hurt feelings, and any emotional reaction accompanying the disclosure of personal information. As such, privacy does not arise from contract

⁵⁷ Huw Beverlley-Smith, Ansgar Ohly and others *Privacy, Property and Personality* (Cambridge University Press, Cambridge, 2006) at 56.

⁵⁸ Neil M Richards and Daniel J Solove “Privacy’s Other Path: Recovering the Law of Confidentiality” (2007) 96 *Georgetown Law Review* 123.

⁵⁹ *Supra* at 127.

⁶⁰ At 127.

⁶¹ At 127.

⁶² Huw Beverlley-Smith, Ansgar Ohly and others *Privacy, Property and Personality* at 53-54.

⁶³ *Prince Albert v Strange* [1849] 47 ER 1302.

⁶⁴ “The principle which protects personal writings and all other personal production, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality” see Samuel D Warren and Louis D Brandeis “The Right to Privacy” (1890) 4 *Harvard Law Review* 193 at 197.

or from special trust, but is rather a right that arises ‘against the world’.⁶⁵ Warren and Brandeis did not seek to formally reject the breach of confidentiality as a remedy for invasion of privacy, but aimed at expanding it to enforce the norms and morality of relationships by adding a protection to the ‘inviolable personality’ and the feelings caused to the individual inflicted by a non-physical injury.⁶⁶

Prosser, who was first of all a legal realist, believed that tort law should be understood as a ‘common sense’ balancing of social interests rather than a series of universal principles.⁶⁷ In other words, in his view, the common law should secure “to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others”.⁶⁸ According to Warren and Brandeis this right “is merely an instance of the enforcement of the more general right of the individual to be let alone” and everything that derives from it.⁶⁹

10.4 – Breach of Confidence v Privacy Law

Generally focussing on relationships instead of emotional distress, confidentiality imposes duties of nondisclosure attached to confidential relationships which prohibit a person from divulging confidential information to any unauthorized person on pain of liability.⁷⁰ An obligation of confidentiality can arise through contracts, containing express or implied terms, or it can arise independently on an equitable basis (see section 10.6). Over the years, the English courts applied breach of confidence even in those cases⁷¹ where there was no attorney-client relationship or direct confidential relations, such as the disclosure of personal information and trade secrets.⁷² In *Morison v Moat*,⁷³ the Court of Chancery held that the case was a “breach of faith and of contract” and made clear that breach

⁶⁵ See Warren and Brandeis at 211.

⁶⁶ At 211.

⁶⁷ See G Edward White *Tort Law in America: an Intellectual History* (Oxford University Press, Oxford and New York, 2003).

⁶⁸ Samuel D Warren and Louis D Brandeis “The Right to Privacy” (1890) 4 *Harvard Law Review* 193 at 198.

⁶⁹ At 205.

⁷⁰ Walter F Pratt *Privacy in Britain* (Associated University Press, 1979).

⁷¹ See *Duke of Queensberry v Shebbeare* [1758] 28 Eng Rep 924, 924 (Ch); *Yovatt v Winyard* [1820] 37 Eng Rep 425 (Ch).

⁷² See *Ashburton v Pape* [1913] 2 ChD 469, 471 (UK) (Cozens-Hardy, MR).

⁷³ *Morison v Moat* [1851] 68 Eng Rep 492 (Ch).

of confidence was to be considered as an equitable remedy separate from property rights.⁷⁴ The focus was still on the relationship between confider and confidant and the confidential information that was exposed.

Privacy law, on the other hand, intends to protect the dignity of the individual against the world. As pointed out by Judge Cooley,⁷⁵ privacy law could be regarded as primarily the right of one's person to be let alone.⁷⁶ In the case of privacy law, the courts do not ask whether personal information has the 'necessary quality of confidence', but whether the information is 'private' and, in this case, if the private information is also confidential.⁷⁷ In analysing privacy and breach of confidence, it is the focus that becomes indicative of the nature of the claim. Breach of confidence results from an existing relationship where some information intended to be kept secret is shared with others; whereas breach of privacy results from information that is deemed to belong to a person whose right includes being let alone. The development of the law on breach of confidence and privacy differ in the American and British systems simply because in the United States, contrary to the United Kingdom and the Commonwealth, the private aspect of the keeper of confidential information was considered more important than any contract or relationship based on confidentiality. Indeed, after his article Brandeis,⁷⁸ in *Olmstead v United States* (1928),⁷⁹

⁷⁴ Supra at 498.

⁷⁵ "Justice Cooley was one of the very first faculty members of the University of Michigan Law School when it opened in 1859. As a professor at the law school, he taught constitutional law, real property, trust, estates, and domestic property. Justice Cooley authored countless articles on legal subjects and wrote several full-length works on constitutional limitations, Blackstone's Commentaries, Story's Commentaries, and Torts. See, Commentaries on the Laws of England: In Four Books / by Sir William Blackstone ... together with a copious analysis of the contents; and notes with reference to English and American decisions and statutes to date which illustrate or change the law of the text; also, a full table of abbreviations, and some considerations regarding the study of law, KD660 .B52 1884, Rare Books" electronic document <www.cooley.edu/about/thomas_mcintyre_cooley.html> last visited on 11/11/2015.

⁷⁶ Neil M Richards and Daniel J Solove "Privacy's Other Path: Recovering the Law of Confidentiality" at 156.

⁷⁷ This change became evident in the House of Lords decision *Campbell v Mirror Groups Newspapers Ltd* ([2004] 2 AC 457 (HL) [51]). In this case the defendant newspaper had disclosed that the claimant was a drug addict and was receiving therapy with Narcotics Anonymous and gave details of the meeting she was attending. Photographs of the claimant leaving a Narcotics Anonymous meeting in London also accompanied the articles. The claimant alleged, *inter alia*, breach of confidence. In dealing with this claim, the Lordships focussed on whether the information regarding the claimant was 'private', as opposed to 'confidential' [Campbell (n 11) [15] 465 (Lord Nicholls), [92] 482 (Lord Hope), [136] 496 (Baroness Hale), [167] 504 (Lord Carswell)] and determined this to whether there was a 'reasonable expectation of privacy' [Campbell (n 11) 466 (Lord Nicholls), 496 (Baroness Hale) and 480 (Lord Hope). However, at 482 and 483, Lord Hope appears to substitute this test with an 'obviously private' test and a modified version of the test from *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] 208 199, 226 (Gleeson CJ) (High Court of Australia)].

⁷⁸ Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 *Harvard Law Review* 193.

⁷⁹ *Olmstead v United States* [1928] 277 US 438, overruled in part by *Katz v United States* [1967] 389 US 347.

incorporated the right to be let alone into the Fourth Amendment⁸⁰ law when, during his mandate as Supreme Court Justice, he stated that "... the makers of our Constitution ... conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men".⁸¹ Therefore, while the tort of breach of confidence in the United States has remained an "obscure and frequently overlooked" corner of American tort law,⁸² privacy law has flourished on that stance. According to Bloustein,⁸³ the interests served in American privacy cases were more of a spiritual interest rather than an interest based on property or reputation or the nature of an injury in a case of invasion of privacy.⁸⁴ As such, privacy law can be intended as a "social vindication of the human spirit rather than compensation for loss suffered".⁸⁵ In its essential traits, privacy law is highly individualistic. The right to be let alone emphasizes the isolation of the individual who can decide how and when to shut out invaders.⁸⁶ On the same line, Prosser provides that "the right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded".⁸⁷ Bloustein, on the other hand, disagrees with Prosser and recognises a unifying theme behind the privacy torts: the individual dignity.⁸⁸ In addition to the above-mentioned four torts, according to Prosser, privacy torts – intrusion upon seclusion, public disclosure, and false light – require that the publicity given to the information disclosed is "highly offensive to a reasonable person".⁸⁹

The general tort of breach of confidence, on the other hand, does not contain any 'highly offensive' requirement as "it views the injury not exclusively in terms of the humiliation caused by the revelation of information but also in terms of

⁸⁰ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

⁸¹ *Olmstead v United States* [1928] 277 US 478.

⁸² Neil M Richards and Daniel J Solove "Privacy's Other Path: Recovering the Law of Confidentiality" (2007) 96 *Georgetown Law Review* 123 at 157.

⁸³ EJ Bloustein "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 34 *NYUL Review* 962.

⁸⁴ Bloustein *supra*.

⁸⁵ Bloustein *supra* at 1001-1002.

⁸⁶ See Daniel J Solove *The Digital Person: Technology and Privacy in the Information* (New York University Press, New York, 2004).

⁸⁷ William L Prosser "Second Restatement of Torts" (1977) 652 I cmt A.

⁸⁸ See Bloustein *supra* at 971.

⁸⁹ William L Prosser "Second Restatement of Torts" (1977) 652 at 652B, 652D, 652E.

the violation of trust between the parties”.⁹⁰ In a way, the torts of privacy and of confidentiality complement each other. Thus, as it will be seen in the course of this chapter, American and English courts preferred, until more recently, to keep the two torts separate.

In the United Kingdom, breach of confidentiality flourished, while privacy law remained distinctively under developed. Courts in the United Kingdom rejected Warren’s and Brandeis’ right to privacy and created a separate body of law known as ‘confidentiality’ or ‘confidence’.⁹¹ Instead of a right to be let alone, confidentiality focuses on the norms of trust within relationships. Contrary to American law, the law in the United Kingdom recognises to information “intermediate states between being completely private (known only to one person) and completely public (in the public domain)”;⁹² whereas in the United States privacy law has tended to regard the private and public as two opposite binaries.⁹³ Hence, confidentiality becomes a key dimension of privacy.⁹⁴ As it is explained in *Gurry*, confidentiality is relevant whenever “information is imparted, either explicitly or implicitly, for a limited purpose The obligation of confidence thus formed extends not only to those confidants who have received confidential information ... but also to any third parties to whom the confidant discloses the information in breach of his obligations”.⁹⁵ Historically, the English

⁹⁰ “As one court explained, whereas the public disclosure tort ‘focuses on the *content* rather than the *source* of the information’, the breach of confidentiality tort focuses on the source and protects confidential information “without regard to the degree of its offensiveness” see Neil M Richards and Daniel J Solove “Privacy’s Other Path: Recovering the Law of Confidentiality” at 175; see also *McCormick v England* 494 S.E.2d 431, 438 (SC Ct App 1997).

⁹¹ Neil M Richards and Daniel J Solove “Privacy’s Other Path: Recovering the Law of Confidentiality” (2007) 96 *Georgetown Law Review* 123 at 159.

⁹² *Supra* at 182.

⁹³ Daniel J Solove *The Digital Person: Technology and Privacy in the Information* (New York University Press, New York, 2004) at 1177.

⁹⁴ “... it cannot be excised from privacy nor can it serve as the sum and substance of privacy either. Because they protect distinct dimensions of the ways in which unwanted disclosures of personal information can be harmful, both confidence and American-style privacy are worth protecting. Recent developments in the law on both sides of the Atlantic suggest that both American and English law are coming to this realization. English law seems to be moving towards encompassing privacy at the same time that the American confidentiality tort is maturing. English law can learn much from the American privacy torts. Perhaps with greater recognition, confidentiality will finally take its place alongside the Warren and Brandeis privacy torts, and the concept of confidentiality will become better integrated into the legal and conceptual landscape of American privacy” see Neil M Richards and Daniel J Solove “Privacy’s Other Path: Recovering the Law of Confidentiality” at 182.

⁹⁵ Francis Gurry *Breach of Confidence* (Clarendon Press, Oxford, 1984) at 4.

tort of breach of confidence crystallized in the case *Coco v Clark* (1969)⁹⁶ where it was stated that, in order to qualify for a breach of confidence, the plaintiff must prove that:⁹⁷

- the information has the necessary quality of confidence about it;
- must have been imparted in circumstances importing an obligation of confidence; and
- there must be an unauthorised use of that information to the detriment of the party communicating it.

In *Corrs Pavey Whitining and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd*⁹⁸ Gumm J stated (at para 443) that “it is now settled that in order to make out a case for the protection in equity of alleged confidential information”, a plaintiff must satisfy certain criteria. The plaintiff:

- must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also show that:
 1. the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge);
 2. the information was received by the defendant in such circumstances as to import an obligation of confidence; and
 3. there is actual evidence of threatened misuse of the information.

Gumm J also added that “it may be necessary ... that unauthorised use would be to the detriment of the plaintiff”.⁹⁹

⁹⁶ *Coco v AN Clark* (1969) RPC at 47 (opinion of Megarry J).

⁹⁷ *Supra* at 47.

⁹⁸ *Corrs Pavey Whitining and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd* [1987] FCA 266 at 443.

⁹⁹ *Corrs Pavey Whitining and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd* at 443; “The first three elements establish an obligation of confidence. The fourth concerns the breach of that obligation and the consequent remedies provided by the courts. ... The remedies for both breach of fiduciary obligation and breach of confidential obligation are identical. Equity acts to protect the original confidence by enjoining the information in breach of the original confidence from the confidant, whether or not they are aware of the original confidence. ... Hence the two elements central to the creation of an obligation of confidence are: 1 – the nature of the confidential information (an objective analysis); 2 – the existence of an obligation of confidence (a subjective analysis)” see Robert Dean *The Law of Trade Secrets and Personal Secrets* at para 3.15.

As it has been explained above, English confidence law instead of protecting the feelings and inviolate personalities of the plaintiffs, justifies nondisclosure in terms of the trust and reliance in a relationship. Consequently, English law protects “against betrayal by confidants rather than embarrassment by strangers”.¹⁰⁰ There are no legal prerequisites or parameters defining which type of information the courts will protect because the courts are not protecting information but rather a confidence.

On a general note, confidential information is that kind of information that is the object of an obligation of confidence and it may include:

- trade secrets;
- literary and artistic secrets;
- personal secrets;
- public and governmental secrets;¹⁰¹ and
- cultural and religious secrets.¹⁰²

In recent years, the English law of confidentiality has ‘forcibly’ moved closer to the American right to privacy. The evolution was forced upon the United Kingdom by its legal involvement in the European Union, which requires all member states to protect the rights enshrined in the European Convention on Human Rights and Fundamental Freedoms (ECHR, adopted in 1950 and entered into force in 1953). In 1998 the UK enforced the Convention at the national level by passing the Human Rights Act (1998). Article 8 of the ECHR provides that “everyone has the right to respect for his private and family life, his home and

¹⁰⁰ Neil M Richards and Daniel J Solove “Privacy’s Other Path: Recovering the Law of Confidentiality” at 166.

¹⁰¹ See Dean at para 3.20.

¹⁰² The cases *Church of Scientology of California v Kaufman* [1973] RPC 635 at 658 and *Foster and Others v Mountford and Rigby Ltd* (1976) 14 ALR 71 prove that a 5th category of cultural and spiritual secret information is emerging and being protected by breach of confidence.

correspondence”.¹⁰³ On the opposite side of the spectrum, Article 10 states that “everyone has the right to freedom of expression”.¹⁰⁴

In recent years English courts have tried to engineer a quiet revolution that tried to fuse the development of common law with the aspirations of Article 8 of the ECHR. According to Hunt,¹⁰⁵ what he considers a “strong indirect horizontal effect” entails that the judges “have an absolute duty under section 6¹⁰⁶ to interpret and apply existing law to render it compatible with the Convention”.¹⁰⁷ Others suggest that a weaker version of the Act exists: arguing that the Human Rights Act (HRA) does not impose the above duty, but rather “the obligation to take account of the Convention principles when engaging in common law adjudication, affording them a variable weight, depending on the context”.¹⁰⁸

¹⁰³ Article 8 of the ECHR states that: “Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

¹⁰⁴ Art 10 of the ECHR states that: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

¹⁰⁵ M Hunt “The Horizontal Effect of the Human Rights Act” (1998) *Public Law* at 423.

¹⁰⁶ Human Right Act (1998) Section 6-Acts of public authorities - (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. (2) Subsection (1) does not apply to an act if—(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. (3) In this section ‘public authority’ includes—(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament. (4) F1 (S. 6(4) repealed (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 146, 148, Sch. 9 para. 66(4), Sch. 18 Pt. 5; S.I. 2009/1604, art. 2(d)(f)) (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private. (6) “An act” includes a failure to act but does not include a failure to—(a) introduce in, or lay before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial order.

¹⁰⁷ M Hunt “The Horizontal Effect of the Human Rights Act” (1998) *Public Law* at 423.

¹⁰⁸ In *A v B plc*, while giving the judgement for the Court, Woolf CJ stated that “under section 6, the court, as public authority, is required not to act ‘in a way which is incompatible with a Convention right’. The Court is able to achieve this by absorbing the rights which articles 8 and 10 protect under into the long-established action for breach of confidence” see *A v B plc* [2002] QB 195, 202 para 4; see also Tanya Aplin, Lionel Bently and others *Gurry on Breach of Confidence* at para 6.80; see also Gavin Phillipson “Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act” (2003) 66 *The Modern Law Review* 726 at 730.

According to Bently,¹⁰⁹ it is certain that, over the years, English courts have sought to “adapt the action for breach of confidence to give effect to the obligation under Article 8” of the ECHR “to provide respect for a person’s private life”. The authors of *Gurry* agree that the adoption of the HRA in the United Kingdom “provided a powerful impetus for courts to develop the action for breach of confidence to offer greater privacy protection”.¹¹⁰ As a result of the introduction of the HRA, Articles 8 and 10 of the ECHR have been invoked with greater frequency in cases of breach of confidence where the HRA “has acted as catalyst for the significant reshaping of the action in the area of private or personal information”.¹¹¹ Lord Hoffman confirmed that the HRA has introduced in the UK changing values by stating that:¹¹²

Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people.

It is correct to assume then, that since the introduction of the HRA, confidential information has acquired a strength and breadth that it did not possess before by including in the criteria of evaluation the private aspect of the information and the emotional distress that the circulation of private/confidential information can cause in the plaintiff. Any confider of confidential information can therefore presume a ‘reasonable expectation of privacy’ as additional text to the claim of confidentiality. And yet, while confidence has expanded its scope, for the English and English-derived systems like New Zealand, privacy and confidence remain two different concepts¹¹³ whose “scope of the cause, or

¹⁰⁹ Lionel Bently *Intellectual Property Law* (Oxford University Press, Oxford and New York, 2014) at 1157.

¹¹⁰ See *Gurry* at para 6.74.

¹¹¹ *Supra* at para 6.79.

¹¹² *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 (HL) [51].

¹¹³ In *Hosking v Runting* [2005] 1 NZLR 1 (NZCA9 [48-49] Tipping J observed that “... it is more jurisprudentially straightforward and easier of logical analysis to recognise that confidence and privacy, while capable of overlapping, are essentially different concepts. Breach of confidence, being an equitable concept, is conscience-based. Invasion of privacy is a common law wrong which is founded on the harm done to the claimant by conduct which can reasonably be regarded as offensive to human values. While it may be possible to achieve the same substantive result by developing the equitable cause of action, I

causes of action protecting privacy should be left to incremental development by future Courts".¹¹⁴ It is clear that the law in the United Kingdom protects personal privacy as well as claims of confidentiality by using the same 'cause of action' but, according to Stanley, courts are still resistant to use a distinct 'privacy tort'.¹¹⁵ Naturally, some cases (especially those of commercial confidential information and those featuring the traditional confidential relationship) are evaluated by confidentiality and others by privacy.¹¹⁶

While bestowing interesting reflexions, it is not the intent of this thesis to explore thoroughly the historical reasons that caused the development of privacy and confidentiality laws. There are better avenues for that. The sections above intended to summarise why privacy law in the United States became explicitly distinct from the British common law on confidentiality. Essentially the two laws complement each other by filling the gaps of what is missing in each one. And yet, the fact that both laws are still evolving and expanding, and considering and including aspects that each possesses, becomes important when analysing the cases of indigenous peoples. It is in fact easier to include indigenous rights in common law (case law) than legislation (statutes). As it will be seen in the next pages, the flexibility of the common law system and its evolution based on case law can become an important factor in the choosing of the most suitable legal alternatives for the protection of indigenous peoples' cultures and secret information.

consider it legally preferable and better for society's understanding of what the Courts are doing to achieve the appropriate substantive outcome under a self-contained and stand-alone common law cause of action to be known as invasion of privacy" at 246.

¹¹⁴ Supra at 117; for further reading see *Gurry on Breach of Confidence*.

¹¹⁵ Paul Stanley *The Law of Confidentiality: A Restatement* (Hart Publishing, Oxford and Portland-Oregon, 2008) at 6.

¹¹⁶ "Cases raising issues of personal privacy which might engage of the Convention will require special focus on the case law of the European Court of Human Rights concerning that article" supra at 6; "Although it is clear that English law protects personal privacy and other forms of confidentiality using the same 'cause of action' (the historic action for breach of confidence) and not a distinct 'privacy tort' it is recognised that some cases (especially those of commercially confidential information and those which feature a traditional 'confidential relationship') are more appropriately described using the language of 'confidence' and 'confidentiality', and others more aptly make use of the terminology of 'privacy'. ... Cases asserting an 'old-fashioned breach of confidence' may well be best addressed by considering established authority. Cases raising issues of personal privacy which might engage Article 8 of the Convention will require special focus on the case law of the European Court of Human Rights concerning that article" see Stanley at 6.

10.5 – Privacy Law and indigenous Cultures

The importance of the article of Warren and Brandeis rests not only in the successful attempt to create a law that would protect the right of a person to be let alone, but also to define the philosophy and ethic that lies behind such a request. Why should someone's life, his or her intellectual production and emotions be regarded as private and inviolable and protected by the law? The answer is: because the law should be designed to protect those persons with whose affairs the society has no 'legitimate' concern to know.¹¹⁷ Additionally, any person should be protected from being dragged into an "undesirable and undesired publicity".¹¹⁸ According to Warren and Brandeis, publications which should be repressed include those on "private lives, habits, acts, and relations of an individual",¹¹⁹ unless he/she is running for a public office or he/she is in a public or quasi public position. On the subject they wrote that:¹²⁰

The invasion of the privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not; just as the damage to character, and to some extent the tendency to provoke a breach of the peace is equally the result of defamation without regard to the motives leading to its publication. Viewed as a wrong to the individual, this rule is the same pervading the whole law of torts, by which one is held responsible for his intentional acts, even though they are committed with no sinister intent and viewed as a wrong to society, it is the same principle adopted in a large category of statutory offences.

Their idea is based on the concept of personality rights. In *Pavesich v New England Life Insurance* (1905)¹²¹ the Court expanded and discussed the tort of privacy giving to it a status that, in the United States, it had not reached yet:¹²²

¹¹⁷ Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 *Harvard Law Review* 193 at 200.

¹¹⁸ *Supra* at 201.

¹¹⁹ *At* 201.

¹²⁰ *At* 202-203.

¹²¹ *Pavesich v New England Life Insurance Co et al* (1905) Supreme Court of Georgia 122 Ga 190; 50 SE 68

¹²² The Court carries on by stating that: "the liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, and in its exercise must be

The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has reserved than he has to violate the valid regulations of the organized government under which he lives. The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. While of course the most flagrant violation of this right would be deprivation of life, yet life itself may be spared and the enjoyment of life entirely destroyed. An individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his

made to accord with the rights of those who have other liberties, as well as the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern. Publicity in many cases is absolutely essential to the welfare of the public. Privacy in other matters is not only essential to the welfare of the individual, but also to the well-being of society. The law stamping the unbreakable seal of privacy upon communications between husband and wife, attorney and client, and similar provisions of the law, is a recognition, not only of the right of privacy, but that for the public good some matters of private concern are not to be made public even with the consent of those interested. It therefore follows from what has been said that a violation of the right of privacy is a direct invasion of a legal right of the individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover. Civil Code, § 3807. In an action for an invasion of such right the damages to be recovered are those for which the law authorizes a recovery in torts of that character; and if the law authorizes a recovery of damages for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for a violation of this right. The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and of the press. The right to speak and the right of privacy have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other. The right to convey one's thoughts by writing or printing grows out of but does not enlarge in any way the natural right of speech; it simply authorizes one to take advantage of those mediums of expression which the ingenuity of man has contrived for broadening and making more effective the influences of that which was formerly confined to mere oral utterances. The right to speak and write and print has been, at different times in the world's history, seriously invaded by those who, for their own selfish purposes, desired to take away from others such privileges, and consequently these rights have been the subject of provisions in the constitutions of the United States and of this State" see *Pavesich v New England Life Insurance Co et al* [1905] electronic document <http://faculty.uml.edu/sgallagher/pavesich_v.htm> last visited on 04/10/2015.

temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbour or violate public law or policy.

Warren and Brandeis specified that mental suffering and emotional harm of unwanted public disclosures exist and often are the consequence of an act that is wrongful in itself (eg defamation). The invasion of someone's life and the forced publication or exposure of facts that are private and personal may be regarded as unlawful. No public interest defence should prevail on defamation.¹²³ As for indigenous guardians, the information in their custody can be considered private and personal because:

- it is not spread among the other members of the community;
- it is often not recorded either because it has been transmitted orally or because its fixation would hinder the role of secrecy embodied by the guardians;
- it is often of sacred/spiritual nature, which means that its disclosure would cause great harm not only to the guardian, but to the whole community; and
- although there might be a public interest in the knowledge held by guardians, its private and personal character should prevail over any 'public interest clause'.¹²⁴

Given the sensitivity of the knowledge held by the guardians, and the importance that their private, secret practices have for the community, the obnoxious publication or exposure of such information should be prevented or prohibited. Any rule of liability adopted should, consequently, have in it the elasticity to address facts that are, not only private, but culturally, ethically and morally highly diverse. In applying the four torts codified by Prosser, one can see that they can all be applied to indigenous secret knowledge.¹²⁵

¹²³ "The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension; the right to protect one's self from pen portraiture, from discussion by the press of one's private affairs, would be a more important and far-reaching one" see Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 *Harvard Law Review* 193 at 200.

¹²⁴ See previous chapters for the description of indigenous' culture and traditions.

¹²⁵ William Prosser "Privacy" (1960) 48 *Cal L Rev* 383 at 383.

1. intrusion upon the plaintiff's seclusion or solitude, or into his private affairs:
 - The role of the guardians entails seclusion and solitude, and affairs dealt with in private. The protection of the knowledge rests in its very private nature. Such knowledge was, in fact, transmitted to a specific member of the community becoming part of his 'personal' heritage.
2. public disclosure of embarrassing private facts about the plaintiff:
 - Any disclosure of information that were supposed to remain secret or highly confidential will cause at least embarrassment, if not great emotional harm to indigenous custodians. In some indigenous communities there are very strict protocols that protect the secrecy of such knowledge entailing dire consequences for those who infringe the protocol/customary law.
3. publicity which places the plaintiff in a false light in the public eye:
 - Any interference with indigenous traditions and holism will most likely picture the guardians and the information in their custody in a fashion that is inappropriate and harmful exactly because it is not based on a clear understanding of what holism means and what the role of the custodians entail
4. appropriation, for the defendant's advantage, of the plaintiff's name or likeness:
 - The acquisition of information that belongs to indigenous guardians might become a resourceful economic asset for anyone who enters into possession of indigenous secret information. This not only exploits indigenous gaining over the knowledge (if indigenous communities agree in commodifying the knowledge), but it will bring great harm where the knowledge was never supposed to enter the public domain in any form.

Being rooted in Common Law, the tort of invasion of privacy is not composed of firmly fixed rules.¹²⁶ Therefore, its development can and should reflect the social

¹²⁶ "Common law is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of men. It is the growth of ages, and an examination of many of its principles, as enunciated and discussed in the books, discloses a constant improvement and development in keeping with advancing civilization and new conditions of society. Its guiding star has always been the rule of right and wrong, and ...

needs of a society. As such, it must change along with the changes of the society because, over time, new rights arise and are recognised. Although there is not much harmonization on international privacy laws, today most jurisdictions worldwide recognise the tort of invasion of privacy.¹²⁷ The heart of our liberty as human beings resides in our capacity to choose which parts of our lives should become public and which not. Originally, the law does not determine what privacy is, but rather “what situations of privacy will be afforded legal protection”.¹²⁸ Yet, over the last four decades, academics have defined privacy as a “right of personhood, intimacy, secrecy, limited access to the self, and control over information”.¹²⁹ And yet, to define the essence and scope of the right in a way that is harmonious for every country of the world remains fundamentally difficult. Westin¹³⁰ believes that privacy is the “claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”. Theorists have spent considerable time in conceptualizing privacy by defining it per *genus et differentiam*. In other words, they have been looking for “a set of necessary and sufficient elements that single out privacy as unique from other conceptions”.¹³¹ Solove argues that:¹³²

When we state that we are protecting ‘privacy’, we are claiming to guard against disruptions to certain practices. Privacy invasions disrupt and sometimes completely annihilate certain practices. Practices can be disrupted in certain ways, such as interference with peace of mind and tranquillity, invasion of solitude, breach of confidentiality, loss of control over facts about oneself, search of one’s person and property, threats to or violations of personal security, destruction of reputation, surveillance and so on.

its principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs” see *Lake v Wal-Mart Stores, Inc* [1998] 582 N W 2d 231.

¹²⁷ See Daniel J Solove and Paul M Schwartz *Information Privacy Law* (Wolters Kluwer, The Netherlands, 2011).

¹²⁸ Hyman Gross “The Concept of Privacy” (1967) 42 *NYU L Rev* 34 at 36.

¹²⁹ Daniel J Solove and Paul M Schwartz *Information Privacy Law* (Wolters Kluwer, The Netherlands, 2011) at 42.

¹³⁰ Solove and Schwartz reporting Alan Westin article “Privacy and Freedom” (1968) 25 *Wash and Lee Law Rev* 166.

¹³¹ Daniel J Solove “Conceptualizing Privacy” (2002) 90 *Cal L Rev* in Daniel J Solove and Paul M Schwartz *Information Privacy Law* (Wolters Kluwer, The Netherlands, 2011) at 51.

¹³² At 52.

Solove's description of what constitutes privacy is particularly pertinent to the issues faced by indigenous guardians. The invasion of their privacy entails the disruption of certain practices of great spiritual significance to the point that it may annihilate them. It also damages the whole community whose cultural survival resides on the respect of sacred and secret practices. Solove recognises that there are similarities and differences in the types of disruptions, as well as the practices that privacy invasions disrupt and, instead of looking for the common denominator, the law should focus on the web of interconnected types of disruption of specific practices and map the typography of the web.¹³³ Invasion of indigenous secret practices should thus be considered as a type of disruption that is highly damaging for indigenous cultures and traditions and should be prevented or impeded. Unlike breach of confidence, breach of privacy does not require a relationship of confidence, because it is not a breach of trust. It directly relates to the nature of the information itself and to private facts that interest a person or a group of people but not the world at large. However, as pointed out by Lai,¹³⁴ privacy law can protect 'private facts' of communities, but "could not be used to limit general, non specific representation of indigenous culture by non-members".¹³⁵ In New Zealand the Court of Appeal has stressed that "the concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned".¹³⁶ However, as for the Australian cases *Bulun Bulun & Anor v R & T Textiles Pty Ltd*¹³⁷ and *Milpururru and Others v Indofurn Pty Ltd and Others*¹³⁸ analysed in chapter three, the harm done by divulging information that is considered sensitive and secret can be truly great. The same happens when the knowledge held in custody by the guardians is used improperly. The test to evaluate the circumstances in which a breach of privacy occurs therefore includes whether the publication or circulation of the sensitive information can be offensive to the reasonable person or can cause

¹³³ See Solove at 52.

¹³⁴ Jessica Christine Lai *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer, Switzerland, 2014).

¹³⁵ Lai at 187.

¹³⁶ *Hosking v Runting* [2005] 1 NZLR 1, 164 P Gault and J Blanchard (CA).

¹³⁷ *Bulun Bulun and Anor v R & T Textiles* [1998] ALR 157.

¹³⁸ *Milpururru and Others v Indofurn Pty Ltd and Others* [1993] 130 ALR 659 at 662.

great harm. Obviously the meter by which Western and indigenous culture can judge this might vary greatly. And this is the reason why, as pointed out by Solove, Western law must make the space for disruptions which are rooted in non-Western contexts and respond to different set of values or cultural affiliations. If the focus of privacy law is on the emotional suffering/distress, what matters is the effect that the invasion of a custodian's privacy will cause to the person of the custodian and to the community at large. At the same time, the law should address how and why the invasion of a custodian's privacy has occurred and what was the intent of the defendant in appropriating the secret knowledge. As stressed by Young and Haley:¹³⁹

In determining the morality of any representation of another culture, a crucial issue must be addressed. This is the issue of how outsiders have obtained information about the culture they represent. We must ask whether any of the information gained by an artist was obtained surreptitiously, deceptively or coercively. Information ought not come through ... stealth ... Nor ought it to come deceptively, as it would if someone were to represent himself as an insider in order to obtain information. Neither should any form of coercion be employed.

Indeed while recent cases give hope that a strong tort of privacy might arise and work alongside breach of confidence to strengthen and complete the latter,¹⁴⁰ however, such shift still lacks of uniformity, harmonisation and general consensus especially at international level. As of today, there is still ambivalence about whether to continue to develop or expand the equitable action for breach of confidence or to introduce a separate tort of privacy.¹⁴¹

¹³⁹ James O Jung and Susan Haley *The Ethics of Cultural Appropriation* (Wiley-Blackwell, 2012) at 282.

¹⁴⁰ In the House of Lords, Lord Nicholls stated that "the essence of the tort is better encapsulated now as misuse of private information' and commented that 'there has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information ... Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people" see *Campbell v MGN Ltd* [2004] UKHL 22 [2004] 2 AC at 473.

¹⁴¹ "Whether a tort of privacy will lead to more comprehensive protection of privacy than is presently the case under breach of confidence depends on the scope of the tort that is recognised. For example, in New Zealand, the Court of Appeal in *Hosking v Runting* chose to recognise a tort of privacy, rather than develop

On the matter, in the New Zealand Court of Appeal Tipping J stated that:¹⁴²

... it is more jurisprudentially straightforward and easier of logical analysis to recognise that confidence and privacy, while capable of overlapping, are essentially different concepts. Breach of confidence being an equitable concept, is conscience-based. Invasion of privacy is a common law wrong which is founded on the harm done to the plaintiff by conduct which can reasonably be regarded as offensive to human values. While it may be possible to achieve the same substantive result by developing the equitable cause of action, I consider it legally preferable and better for society's understanding of what the Courts are doing to achieve the appropriate substantive outcome under a self-contained and stand-alone common law cause of action to be known as invasion of privacy.

Indeed, without general consensus and harmonization and clear delineation of what de facto constitutes privacy law, it will remain uncertain how privacy can be applied to safeguard indigenous peoples' interests. There is potential for such development as shown. Right now, and especially in the common law system, it seems that the action for breach of confidence better responds to indigenous issues. Although somewhat marginally, breach of confidence has, in fact, already been employed to protect indigenous secret knowledge and private information.¹⁴³ The next sections will show how and why this has occurred.

the action for breach of confidence along similar lines to English courts. The court defined the tort as relating to wrongful publicity of private facts and Gault and Blanchard JJ noted that the same result could have been reached either by a tort of privacy or the breach of confidence route. Nonetheless, the former approach was favoured because it would be 'conducive of clearer analysis' (*Hosking v Runting* (n 37) 15). It could also be argued that even if a newly recognised tort of privacy is limited in scope and covers the same ground as the extended form of breach of confidence, the establishment of a tort creates the potential for its further expansion. For example in *Hosking v Runting* the Court did not exclude the possibility of a tortious remedy for 'unreasonable intrusion into a person's solitude or seclusion', but merely left the issue open for another time" see Tanya Aplin "The Future of Breach of Confidence and the Protection of Privacy" (2007) *Oxford University Commonwealth Law Journal* 137 at 154-155.

¹⁴² *Hosking v Runting and Pacific Magazines NZ Ltd* [2004] NZCA 34 at 59 (Tipping J).

¹⁴³ *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at 136 (Baroness Hale); *Foster and Others v Mountford and Rigby Ltd* (1976) 14 ALR 71.

10.6 – Breach of Confidence and Indigenous Peoples

As we have seen, it is generally believed that the origins of the breach of confidence are quite obscure. Scholars have often discussed whether the breach of confidence has its roots in contract, tort, property or equity, reaching the conclusion that the basis of the action seems to favour equity.¹⁴⁴ In fact, a ‘fiduciary relationship’ is an equitable relationship in which “one party has a duty to act for the benefit of another,¹⁴⁵ and it arises, for example, between solicitor and client, or trustee and beneficiary”.¹⁴⁶ Modern commentators have adopted the view that the action for breach of confidence is “an application of the broader notion of good faith”,¹⁴⁷ which needs a *sui generis* action, being a separate cause of action in its own right.¹⁴⁸ Thus, it is generally agreed that in the long tradition of the common law, equity will enforce obligations between people who “are or have been in a relationship of ‘confidence’ with each other”.¹⁴⁹ Consequently, originally to have an obligation of confidence there must have been a pre-existing confidential relationship. Later on, the pre-existing confidential relationship’s requirement was removed by Lord Goff in the *Spycatcher* case.¹⁵⁰ Once freed from that requirement, “the law was readily able to find a duty of confidence when the information was extracted not by

¹⁴⁴ See *Gurry* at Ch 4; “The rules of equity arose in England when the strictures of common law proved unable to satisfy the demands of justice. The High Court of Chancery would determine cases on behalf of the King according to principles of equity or fairness and could go beyond the strict letter of the law. Whilst over time the Courts of Chancery and the tenets of equity have merged with the common law, courts exercising an equitable jurisdiction still serve their original function. Equity is an over-arching (or underpinning) mechanism to ensure just behaviour in relations between citizens. It is not restricted to specific situations, and can move freely into areas where it has not previously been applied. Equity serves as the legal basis for enforcing proper behaviour when one person is in a situation of dependence on another” see Paul Martin and Michael Jeffery “Using a legally Enforceable Knowledge Trust to Fulfil the Moral Obligation to Protect Indigenous Secrets” (2007) 11 1 *NZ J Env'tl L*.

¹⁴⁵ See *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18.

¹⁴⁶ See *Boardman v Phipps* [1967] 2 AC 46.

¹⁴⁷ Lionel Bently *Intellectual Property Law* at 1139.

¹⁴⁸ Bently at 1140.

¹⁴⁹ “A communicated information to B on terms that B would keep the information secret, equity would intervene to require B to comply with his obligations” see Paul Stanley *The Law of Confidentiality: A Restatement* at 3.

¹⁵⁰ See *Attorney-General v Guardian Newspaper (No 2)* [1990] 1 AC 109 at 281; “Lord Goff’s *Spycatcher* formulation referred simply to ‘confidential information’. In later cases, the courts grappled more closely with what makes information ‘confidential’. A generally applicable standard was suggested in *Campbell v MGN Ltd*. Lord Nicholls pointed out that the action for breach of confidence had ‘firmly shaken off the limiting constraint of the need for an initial confidential relationship’. English law would now protect not only commercially confidential information, or information imparted ‘in confidence’ but also information about an individual’s private life” see Paul Stanley *The Law of Confidentiality: A Restatement* at 5.

agreement, but unwillingly or even without the claimant's consent".¹⁵¹ Lord Goff clarified that there are "two ways in which a defendant is held bound by an obligation of confidence":¹⁵²

- where he has agreed, or is held to have agreed, to be so bound; or
- where he has sufficient notice that the information in question is confidential regardless of agreement.

In fact, all information that is not generally known or, in the case of personal information, everything that is not 'notoriously' known, may be confidential information.¹⁵³ Information which is 'obvious' cannot be confidential.¹⁵⁴ According to Bently (who refers to the British-derived legal systems based on Common Law), the action for breach of confidence is "broad-ranging and has been used in relation to personal, commercial and technical information, as well as trade secrets, know-how, and information about government".¹⁵⁵ Because the action is broad-ranging, it therefore "performs a number of different roles and protects a variety of interests".¹⁵⁶ In some circumstances confidentiality encourages any secret information to be disclosed to a small circle of confidants. Often, Bently explains, "the action operates to restrict disclosure in order to protect individual autonomy, personality, and privacy".¹⁵⁷ In order to qualify for a claim for breach of confidence, the claimant must show that:

- the information is capable of being protected;
- the defendant owes the claimant an obligation to keep the information confidential; and

¹⁵¹ See Stanley at 4.

¹⁵² Stanley at 20.

¹⁵³ "The range of information that can be protected is limited only by the fact that the courts will not protect trivial tittle tattle or 'perfectly useless' information such as a dubious system of picking winners at horse races; or information that is 'pernicious nonsense' and 'utterly absurd'. There must be sufficient gravity to intervene" see Robert Dean *The Law of Trade Secrets and Personal Secrets* at para 3.25.

¹⁵⁴ "Novelty will be an important factor in bestowing confidentiality where the information is a combination of commonly known factors to which has been applied some 'product of the human brain' (*Linda Chih Ling Koo v Lam Tai Hing* [1992] 23 IPR 607 at 627) see also Dean at para 3.100.

¹⁵⁵ Lionel Bently *Intellectual Property Law* at 1137.

¹⁵⁶ See Bently at 1137.

¹⁵⁷ Lionel Bently citing E Hettinger "Justification for Intellectual Property" (1989) 19 *Philos Public Aff* 31 and L Paine "Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger" (1991) 20 *Philos Public Aff* 247.

- the defendant used the information in a way that breached that duty.¹⁵⁸

The circumstances in which a claimant has reasonable expectations of confidentiality include:

- any relationship between claimant and confidant within which the information was acquired;
- how far access to the information was limited to a restricted group of people;
- the nature of the information, and in particular its subject-matter, form and sensitivity for the claimant; and
- whether the information has been communicated for a specific purpose.¹⁵⁹

According to Bently, there are “no formal requirements relating to the manner in which the information is expressed which must be satisfied before the information can be said to be confidential”.¹⁶⁰ The main concern of the Courts has been to protect “the substance behind the physical record of information – the ideas or thoughts” and they have regarded the way in which the information was translated as inconsequential.¹⁶¹ The test to ascertain whether there is a duty of confidence is to ask: “Would a reasonable recipient have realized that the information was given to them in confidence?”¹⁶² According to *Gurry*, within the realm of confidential information, the term ‘disclosure’ is used compendiously to include all situations that may occur in which the confidant is given access to the information with the knowledge or consent of the confider.¹⁶³ As seen above, sometimes the confidant then passes the information to third parties who become then liable of the same tort of breach of confidence. Third party liability

¹⁵⁸ *Coco v Clark* [1969] RPC 41.

¹⁵⁹ Paul Stanley *The Law of Confidentiality: A Restatement* at 7.

¹⁶⁰ See *Gurry* at para 5.10.

¹⁶¹ *Supra*.

¹⁶² See Bently *Intellectual Property Law* at 1161.

¹⁶³ “It could involve either some positive action, such as the direct communication of information, or tacit consent to a situation which exposes another to confidential information ... An obligation is imposed because of notice of confidentiality of the information and this is to be judged objectively. The second situation in which an obligation can arise is where confidential information is surreptitiously or accidentally acquired. A third situation in which an obligation of confidence can arise is where a third party, who was not privy to a disclosure by a confider, receives confidential information from a confidant who was ... Finally, in situations where a reasonable expectation of privacy is established, an obligation of confidence will arise where a person knows or ought to know that the information is ‘private’” see *Gurry* at para 7.1.

includes situations in which A passes information to B who, without authorization from A passes it to C, the third party. In this case the courts' intervention have mainly involved the reinforcement of the obligation between A and B. Even when the confidence is exchanged in implied terms, such terms restrain the confidant from sharing the information with a third party or the general public. A third party's breach of an equitable or contractual/implied-contractual obligation of confidence can happen in different ways:

- where the third party receives the confidential information with knowledge of the breach; or
- where the third party innocently receives the confidential information but is later given notice of the breach of confidence through which he received the information.¹⁶⁴

It is obvious that in the first case the third party has actual knowledge of the breach at the time he receives the information and therefore he/she is liable for the same breach. In this case, if the third party carries on making use of the information, the action is aggravated by the presence of an element of dishonesty that would, alone, be "a sufficient basis for his liability, irrespective of the state of mind of the trustee who is in breach of trust".¹⁶⁵ Although dishonesty cannot be considered a prerequisite for establishing a third party liability for breach of confidence, it helps establishing actual knowledge "as illustrated in the case *Prince Albert v Strange*, where the claimant sought to enjoin two third parties, Judge and Strange, from using confidential information".¹⁶⁶ In the case where the third party receives the information and is totally unaware of the confidential status of the information received, he/she

¹⁶⁴ "In the first situation, the assessment is directed to the knowledge of the third party at the time of the receipt, and the knowledge may be actual, imputed, or constructive. In the second situation, the notice serves to give the third party actual knowledge of past impropriety of which he was previously unaware. It is to be differentiated from the existence of circumstances which at the time which at the time the third party receives confidential information serve to give him constructive knowledge of an impropriety in which he is participating" see *Gurry* para 7.104 at 286.

¹⁶⁵ "What constitutes 'dishonesty' for accessories to breach of trust has been controversial, but the position is that it should be judged by the 'ordinary standards of reasonable and honest people' and the third party must have 'himself realized that by those standards his conduct was dishonest'" see *Twinsectra Ltd v Yardley* [2002] AC 1664 (HL), [27] (Lord Hutton delivering the leading speech of the majority; Lord Millett dissenting)

¹⁶⁶ See *Gurry* para 7.111 at 290.

will be nonetheless liable to be restrained from using confidential information. Yet, as specified in *Gurry*, “the liability of such an ‘innocent’ third party, arises only from the date at which he is informed, or given notice, that the information previously communicated to him was acquired as a result of a breach of confidence”.¹⁶⁷ In other words, to protect breach of confidence, it is important how the information is acquired and why, and what is done with the information once there is valid knowledge that a breach of confidence occurred.

It is often argued that the disclosure of private, confidential information is of importance for the public and therefore no restrictions should be put to prevent the circulation of the information. As it will be seen in section 10.8.2, the public interest defence is based on the fact that some information is of importance to the public.¹⁶⁸ English courts have, over the years, recognized the public interest as a defence or as being part of the freedom of expression argument. In most cases, the argument is that the information imparted contains elements that are of ‘interest’ to the wider community such as disclosing wrong deeds made by public representatives, medical dangers to the public, disclosure of some iniquity. These dangers to the public can be many and it is fair to say that their disclosure is of great importance. In *Church of Scientology v Kaufman*,¹⁶⁹ it was held that the disclosure of unclear, spiritual and medical practices taking place behind closed doors within the Church were considered dangerous for the public and people should have known what was really happening inside the Church of Scientology. Goff J favoured the publication of the book on the basis that the defendant’s breakdown was obviously due to his involvement with the Church and its practices.¹⁷⁰ However, it is not always easy to assess how tangible a benefit or a threat to the public welfare must be in order to claim the public interest defence. As it will be seen in the course of this chapter, in the case of the secret information of indigenous peoples, the disclosure of such knowledge

¹⁶⁷ *Gurry* para 7.119 at 292; see also *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 634; *Fraser v Evans* [1969] 1 QB 349, 361 (Lord Denning MR) and *Johns v Australian Securities Commission* [1993] 178 CLR 408, 459-460 (Gaudron J).

¹⁶⁸ “The existence of the defence of just cause or excuse has been recognized by the courts in a large number of cases. In certain situations, the defence operated to destroy any obligations of confidence related to the commission of a crime or civil wrong, since, in these cases, it was said that ‘there is no confidence as to the disclosure of iniquity’” for more details see *Gurry* para 16.05, 16.06 at 684-685.

¹⁶⁹ *Church of Scientology v Kaufman* [1973] RPC 635.

¹⁷⁰ *Church of Scientology v Kaufman* [1973] RPC 652.

might have anthropological, commercial or cultural value, but it can hardly be considered valuable to prevent any threat to the public welfare. Indigenous confidential information has spiritual value for the community and the guardians who hold it, and its protection has vital importance for the community and the integrity of its traditions. Hardly any claim of public interest can be, therefore, applied to indigenous secret knowledge.

Having said this, in general, what kind of information can be then safeguarded by confidentiality law?

Over the years, confidentiality has been established in information which “is verbal, such as a list of agents used in business; diagrammatic, such as production of drawings for a machine; or other equipment, or tools; pictorial, such as photographs or etchings; aural in form of a sound recording; or which is composed simply of figures ...” and so forth.¹⁷¹ In *Argyll v Argyll* it was stated that “it is sufficient that the court recognises that the communications are confidential, and their publication within the mischief which the law as its policy seeks to avoid, without further defining the scope and limits of the jurisdiction”.¹⁷² So, the concern of the law on confidentiality focuses on the attributes of the information, the most relevant of which remains its inaccessibility. In other words, the information must not be ‘common knowledge’ or in the public domain.¹⁷³ The test for its inaccessibility most often involves any attempt to reproduce the information itself, or whether any special skills or previous knowledge are required to come up with the information. Yet, the law does not require the information to be ‘absolutely inaccessible’ to qualify as confidential. Similarly, the information does not need to have a specific economic or moral value. It can qualify as confidential even when the value and importance of the information are understood only by the claimant. While “objective value (or commercial attractiveness) should not be considered a precondition of confidentiality, it may assist in determining that information is confidential”.¹⁷⁴

¹⁷¹ For more detail on the cases see *Gurry* at para 5.10.

¹⁷² *Argyll v Argyll* [1967] 1 Ch 302, 330 (Ungoed-Thomas).

¹⁷³ See *Gurry* at para 5.14.

¹⁷⁴ *Gurry* at para 5.54; see also *HEFCE v Information Commissioner, Guardian News* Decision 13 January 2010 [35].

By the same token, the simplicity of an idea is not prejudicial to considering it as confidential. In *Coco v AN Clark (Engineers) Ltd*, Megarry J held that “the simplest the idea, the more likely it is to need protection”.¹⁷⁵ In addition to that, the information does not have to be necessarily ‘new’¹⁷⁶ but it cannot be ‘obvious’.

Among the categories that fit within the conundrum of confidentiality there are artistic and literary information and personal information along with the more economically valuable trade and commercial secrets.¹⁷⁷ And yet, the boundaries between the categories are not necessarily defined and rigid. There might be an overlapping especially in the information that might not have economic value for the confider,¹⁷⁸ but becomes economically valuable once brought to the public domain (eg publications, photographs, documentaries and so forth).¹⁷⁹

In *Foster v Mountford* the information that was held to be confidential did not fit into any of the above categories. The case, which will be discussed in more detail later on in this chapter, opened the space for a new category of secret/confidential information: cultural secrets. About the case, *Gurry* states that “although the secrets were incorporated into a literary work, it is difficult to categorize them as literary or artistic confidences because they related so directly to aspects of the indigenous culture of the Pitjantjara people in Australia”.¹⁸⁰ Excluded from any claim of confidentiality remain trivial information, immoral information and all those forms that are too vague or general to qualify, and all the information that is already in the public domain.¹⁸¹

The requirements for confidentiality are quite broad, and yet, the uncertain tradition of breach of confidence can play in favour of indigenous peoples’ knowledge. Indigenous secret information is often of a spiritual and cultural

¹⁷⁵ *Coco v AN Clark* [1969] RPC at 47 (opinion of Megarry J).

¹⁷⁶ “Novelty will be an important factor in bestowing confidentiality where the information is a combination of commonly known factors to which has been applied some ‘product of the human brain’” see Robert Dean *The Law of Trade Secrets and Personal Secrets* at para 3.100.

¹⁷⁷ The thesis will not address neither the former nor governmental secrets because not directly relevant to any discourse on indigenous confidential information.

¹⁷⁸ In *Duchess of Argyll v Duke of Argyll* the Court laid down a principle that “secret information provided in confidence in non-commercial relations, about non-commercial issues, can equally be protected by equity as commercial secrets” see *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; in *Silvercrest Sales Pty Ltd v Gainsborough Printing Co Ltd* it was accepted that “information which is secret does not have to be of high commercial value to be protected” see *Silvercrest Sales Pty Ltd v Gainsborough Printing Co Ltd* [1985] 5 IPR 123.

¹⁷⁹ See *Gurry* at para 6.02.

¹⁸⁰ See *Gurry* at para 6.03.

¹⁸¹ Lionel Bently *Intellectual Property Law* Part V on Confidential Information at 1137.

nature and the reason why it cannot be shared with everyone is strictly dependent on traditions and customs. Part of indigenous secret information is of an intangible nature (rituals, stories, songs, practices and so forth) and part is tangible (eg special objects imbued with spiritual significance that are used during the performance of specific rituals). Such information is not private in the strict sense of the word, but it might be part of the personal heritage of one person, and therefore regarded as private and highly sensitive. A guardian holds the knowledge that is transmitted to him and, following the reasoning of privacy law, has the right to be left alone. On the other hand, guardians normally receive the information from third parties who select them as the right descendants and keepers of the knowledge.¹⁸² As such, the information is shared in total confidence and generally the confidence remains between the parties until the guardian decides to pass it to a chosen person who will take his place in due time. Depending on the nature of the information and the duty attached to it, the custodian can either keep the information for himself or share it with other members of the community. Commonly, the sharing of such information happens within a context of known and accepted confidentiality supported and controlled by the laws and customs of the community. Generally, no one within indigenous communities invades the privacy of the elders and custodians. And yet, having said this, what happens when a whole group of people knows the same information which is restricted from outsiders? What obligations does each have against the other? In this case there is a relationship among the 'co-owners'.¹⁸³ This joint secrecy exists as long as the relationship exists and binds the members even when the relationship is over. The same happens within indigenous communities. The secrecy is supposed to be held indefinitely and the customary laws of the community exist to make sure that secret knowledge remains secret. It is also true, however, that any member of the community who

¹⁸² According to Long: "In many instances, information that relates to generational innovation is kept secret for a completely different reason. It is not the commercial value of the information which necessitates its controlled dissemination and use. Rather, it is its sacred or culturally sensitive nature. Thus, for example, the traditional healer in Tumkur was careful to limit access to his methodology to family members. The purpose for such limited access was not to maintain the commercial value of the knowledge, but to honor and hold sacred the teachings of the goddess whose rituals he incorporated into his cures, and whose support he invoked" see Doris Estelle Long "Trade Secrets and Traditional Knowledge: Strengthening International Protection of Indigenous Innovations" in Rochelle Cooper Dreyfuss and Katherine Strandberg (eds) *The Law and Theory of Trade Secrecy* (Edward Elgar Publishing, 2011) at Ch 9.

¹⁸³ Robert Dean *The Law of Trade Secrets and Personal Secrets* at para 3.240.

receives the confidential information can breach such trust; and many are the cases in which this happens today.¹⁸⁴ Martin and Jeffery¹⁸⁵ recognise that “secret knowledge carries symbolic value as a key to membership of a privileged group, with prestige and responsibility. Knowledge has value as a currency, and as a source of status”. In this case, the existence of the law regarding breach of confidence can work to protect information that is exploited either from the inside as well as the outside. Having specified this, it is fair to point out that today the biggest threat for indigenous keepers of secret information still comes from outside their traditional milieu, and usually for economic profit. While the law normally investigates into the motives why information should be kept secret (eg commercial value of the information), confidentiality does not try to control the dissemination of information because of its economic value. It protects the information regardless, as long as the information is not trivial, offensive and not in the public domain.¹⁸⁶

In her book, Lai argues that indigenous knowledge might not possess the “necessary quality of confidence”.¹⁸⁷ She explains that courts might not regard rock art, medicines and practices passed down for generations as having the quality of confidence but instead being regarded as information in the public domain.¹⁸⁸ As it will be discussed, the context and the relationship between confider and confidant determines whether a relationship of confidence is in place. It does not matter whether the information has been transmitted from one generation to another in a rock carving or a remedy; what counts is the modality in which it is shared, and whether it possesses a quality of inaccessibility, secrecy or relative secrecy. The law of confidentiality is, in fact, built around the notion of ‘relative secrecy’. This means that the ‘secret’ can be known by a number of people without making it de facto public as long as the

¹⁸⁴ According to Martin and Jeffery “... any person in a tribal group can access common pool knowledge. The situation can arise where one tribal member holds information as secret, and another is prepared to disseminate it freely” see Paul Martin and Michael Jeffery “Using a Legally Enforceable Knowledge Trust to Fulfil the Moral Obligation to Protect Indigenous Secrets” (2007) 11 1 *NZ J Env'tl L* at 25.

¹⁸⁵ *Supra* at 24.

¹⁸⁶ See Lionel Bently *Intellectual Property Law* at 1137.

¹⁸⁷ Jessica Christine Lai *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer, Switzerland, 2014) at 171.

¹⁸⁸ *Supra*.

group maintains the confidentiality. In *Prince Albert v Strange*,¹⁸⁹ although the 'secret' was known by relatives and friends, the confidentiality over it persisted. In this case, the Chancellor concluded that Prince Albert had "a common law literary property right in unpublished work – essentially, a common law copyright in unpublished works. The author had the right to keep his works from being published to protect his 'private use and pleasure'".¹⁹⁰ This means that the common indigenous tradition to share the secret knowledge among very few people will not impede confidentiality to be applied to the information circulating among that selected group of people. Bently explains that the crucial question to be asked is: how widespread must the information be for it to lose its status as a secret and for it to fall into the public domain?¹⁹¹ Bently answers the question by specifying that the degree of publication required before secrecy is lost depends on several factors that he restricts to:¹⁹²

- the type of information;
- the section of the public that has an interest in knowing about the information;
- the domain in which the information was published; the location and extent of publication within the domain;
- the form in which the information is published;
- the length of time for which the publication is accessible; and
- the vigour with which the information is likely to be pursued within that domain.

It also depends on the manner in which the information was acquired. What happens when the information is acquired in a surreptitious way without the knowledge of the discloser?

¹⁸⁹ *Prince Albert v Strange* [1849].

¹⁹⁰ Neil M Richards and Daniel J Solove "Privacy's Other Path: Recovering the Law of Confidentiality" (2007) 96 *Georgetown Law Review* 123 at 130 citing *Prince Albert v Strange* [1849] 64 Eng Rep 293, 295 (Ch).

¹⁹¹ Lionel Bently *Intellectual Property Law* Part V on Confidential Information.

¹⁹² See Bently at 1148.

10.6.1 – Surreptitious Acquisition

In 1984, Michael Heller, a photographer working for the *Santa Fe New Mexican*, flew at low altitude over a sacred ceremonial dance held by the Pueblo of Santo Domingo. The photographs were published by the *New Mexican* on two different occasions where, in the second occasion, the ceremony was described as a “pow-wow”.¹⁹³ Obviously, secret information stolen or exploited from indigenous peoples might be of great interest for researchers and anthropologists. No one discusses that. It is also true that parts or wholes of indigenous traditions are already in the public domain. However, following the logic of ‘relative secrecy’, much of the knowledge partially circulating could still be protected under the law of confidence. In that occasion, the Pueblo filed suit in federal District Court alleging trespass, violation of the Pueblo’s ban on photography, and invasion of privacy.¹⁹⁴ Unfortunately, the suit was dismissed one year later without effective relief granted because no trespass had happened and therefore no violation of the Pueblo’s rights. The *El duPont de Nemours v Christopher*¹⁹⁵ case presents striking similarities with the one filed by the Pueblo people (apart from the highly spiritual content of the photos taken) where photographs of an unfinished facility (showing the plaintiff’s secret production of methanol) were taken from the air. In that occasion, the Court ruled that aerial photography “constituted ‘improper means’ of discovery of trade secrets under the Restatement of Torts, as added by state law”.¹⁹⁶ Both cases are based on very similar instances: in both cases the images were obtained surreptitiously¹⁹⁷ (in other words by improper means). Normally, surreptitious acquisition of confidential information may encompass a broad range of activities such as stealing a confidential product or document; secretly photographing, filming, or otherwise recording the activities

¹⁹³ Complaint for Damages and for Injunctive Relief at 4, *Pueblo of Santo Domingo* (No CIV 84-0192-C) at 7-8.

¹⁹⁴ “The Pueblo’s attorney, Scott Borg, added that the tribal officials believed that such interference ‘tends to negate the effectiveness of the dances’, which are intended to affect not only the tribe, but everyone. At least five local religious leaders offered support, expressing disapproval of the disruption of a spiritual accusation. ... While the Pueblo’s legal counsel skilfully presented the available arguments, current law remains a rather blunt instrument with which to protect a ceremonial dance” see Susan Scafidi “Intellectual Property and Cultural Products” (2001) 81 *BU L Rev* 793 at 829-830.

¹⁹⁵ *E I duPont de Nemours v Christopher* 431 F2d 1012 (5th Cir. 1970) 400 US 1024 (1971).

¹⁹⁶ At 1017 (basing decision on *Restatement (First) of Torts* (1939) at 757).

¹⁹⁷ In *Hunt v A* [2007] NZCA 332 [77] surreptitious acquisition is considered: “where A obtains confidential information from X as a result of industrial espionage or something of that kind, and passes to B”.

of a person or business; hacking into an encrypted computer to access documents or email correspondence; tapping a telephone; or intercepting mail in the post.¹⁹⁸ Such activities can happen in private, public, commercial or governmental contexts. Modern technology has brought the surreptitious acquisition of secret information to a new level in efficiency and speed. Much of indigenous secret information is received not only in contexts of confidentiality (internal within the community and external with researchers and anthropologists), but is then fixed on permanent records: often without the knowledge or authorization of the confider. The surreptitiousness resides in the intent with which a researcher or an anthropologist approaches the guardian or guardians of knowledge. The trust established and the confidence shared is often based on a different understanding of how the information will be used later.

While surreptitious acquisition of private, personal information involves physical interference with another's property or person, the tort of trespass in someone else's property or the conversion of the information surreptitiously acquired is recognised with difficulty because often the trespass is accepted and welcomed by the guardian and the information is willingly shared in a mutual understanding that secrecy and confidence are contextually in existence and, as such, should persist afterwards. In 1981 the United Kingdom Law Commission concluded in its Report that:¹⁹⁹

... under the present law it is very doubtful to what extent, if at all, information becomes impressed with an obligation of confidence by reason solely of the reprehensible means by which it has been acquired, and irrespective of some special relationship between the person alleged to owe the obligation and the person to whom it is alleged to be owed.

According to *Gurry*, breach of confidence is broad enough to include the confidential nature of the information acquired and the modality with which it has been acquired. Indeed, the basis for the intervention of the courts is the "knowledge of the acquirer that the information is confidential, and that

¹⁹⁸ See *Gurry* at para 7.53.

¹⁹⁹ Law Commission Report No 110, Cmnd 8388, *Breach of Confidence* (1981) (Law Com Report) at 4.9.

reprehensible or surreptitious means used to obtain information evidences this knowledge”.²⁰⁰ In other words, the circumstances, the behaviour and the intent of the confidant demonstrate if there is a case of surreptitious acquisition of confidential information. This argumentation is important because, as it will be seen in the next sections of this chapter, most of the confidential information obtained from indigenous guardians and holders is often acquired in ways that, while not always strictly surreptitious per se, entail a strong component of asymmetry in the understanding and valuing of the confidential relationship established and the future usage of the information acquired. Such asymmetry is often based on ignorance, inexperience and trust; and while it damages indigenous guardians, it works at the advantage of any confidant who, at the time of the confidence or lately, knows exactly how to convert and use the information in the public domain.

It is true that over the centuries indigenous knowledge has had a diversified destiny. It is also true that it is today impossible to follow the destiny of every piece of knowledge and reconstruct when, how and in which way it was surreptitiously stolen or became public. In the same token, not much in terms of legal remedies can be provided for those aspects of indigenous cultures that have entered the public domain surreptitiously or not. However, something can still be done for all the information that is still protected by indigenous custodians. As it will be seen in the next section, in the cultural context of indigenous communities it becomes of great importance how the information is kept secret and why, and also why confidants resort to surreptitious means to acquire secret information. It is also important to understand why indigenous people prefer to keep ‘secret’ knowledge that might have great intrinsic economic value once exploited or traded in the public domain.

²⁰⁰ See *Gurry* at para 7.55.

10.7 – Breach of Confidence and Trade Secrets Law

Indigenous traditional knowledge, secret or not, can have enormous economic value once commodified.²⁰¹ As we have seen in the previous chapter, trade secrets laws restrict the subjectivity of sensitive information (subjective to every community and guardian who holds it) by valuing its objective economic counterpart (the economic value that the knowledge will have once entered the public domain). Trade secrets law, like patent and copyright laws, protects intangible, informational goods. However, the knowledge that is protected needs to be of economic value. Confidential information and undisclosed information are covered by two international agreements: TRIPS - Art 39²⁰² - and Paris Convention - Art 10bis.²⁰³ In general, trade secrets law protects certain confidential information that companies attempt to keep secret. This includes ‘technical’ information such as mechanical processes and chemical formulae, and business-related information like customer lists, marketing plans, pricing data and so forth. Virtually any useful information can be a trade secret, as long as the information is relatively secret, economically valuable, and subjected to

²⁰¹ “Many indigenous and local communities object to the way their communally developed agricultural strains, folklore, and traditional medicines—their ‘traditional knowledge’—serve as free building blocks for the patents and copyrights of outsiders, often without any recognition, compensation, or control over the way this information is used. Traditional knowledge provides certain multibillion dollar industries, including pharmaceuticals, cosmetics, and agriculture, with useful leads for product discovery and development. Intellectual property law readily recognizes these industries’ ‘innovations’. But it often turns a blind eye to the incremental and seemingly unscientific contributions of traditional knowledge holders, who are some of the world’s poorest people” see Deepa Varadarajan “A Trade Secret Approach to Protecting Traditional Knowledge” (2011) 36 *The Yale Journal of International Law* 371 at 372 electronic document <www.yjil.org/docs/pub/36-2-varadarajan-trade-secret-approach-to-protecting-traditional-knowledge_update.pdf> last visited on 27/12/2015.

²⁰² Article 39.2 of the TRIPS Agreement reads: “Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret”.

²⁰³ Article 10bis of the Paris Convention reads: “(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition. (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. (3) The following in particular shall be prohibited: (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods”.

reasonable secrecy precautions by the owner.²⁰⁴ The idea of protection through trade secrets could apply to traditional ecologic knowledge that indigenous peoples have developed over centuries of interaction with the natural environment. That knowledge might be secret or not and may not hold much economic value for the indigenous peoples who developed it, but it might have a great economic value for the people/multinationals who aim to exploit it within its natural setting.²⁰⁵

Generally, in case of traditional knowledge with economic value, trade secrets remain an important aspect of confidentiality especially in those laws that derive from the British common law system. While in countries like the United States and other jurisdictions based on civil law trade secrets is a distinct body of law that applies to valuable commercial secrets and is separate from breach of confidence law, in countries like England, Australia, Canada and New Zealand trade secrets fall under the umbrella of breach of confidence. In other legal regimes the appropriate action for invasion or publication of information that is personal falls within the sphere of an action for invasion or breach of privacy and use ordinary statutory provisions or the national jurisprudential development of a specific tort to protect such invasion.²⁰⁶ As seen above, in recent years, in England breach of confidence has significantly mutated its customary aspect inherited from the common law tradition to perform also the role of a tort of invasion of privacy, while in the United States invasion of privacy has prevailed over breach of confidence. And while the inherited British tort for breach of confidence was put aside, a separate tort of invasion of privacy developed from

²⁰⁴ See David D Friedman, Richard Posner and others "Some Economics of Trade Secret Law" (1991) 5 1 *Journal of Economic Perspective* 61-72; William Van Caenegem *Trade Secrets and Intellectual Property: Breach of Confidence, Misappropriation and Unfair Competition* (Kluwer Law International, The Netherlands, 2014); Deepa Varadarajan "Trade Secret Fair Use" (2014) 83 *Fordham Law Review*; Robert Dean *The Law of Trade Secrets and Personal Secrets*.

²⁰⁵ The material covering indigenous ecologic knowledge is broad, that is why the aim of the thesis is to address the intangible/secret aspect of indigenous culture and not the tangible biological result of indigenous study of biology. This decision has been exhaustively explained in the previous chapters. While, in fact, much has been written on indigenous ecological knowledge, less has been written on indigenous intangible secret knowledge (which can be ecological, cultural or spiritual) as fitting within the category of confidential information. The reason is quite simple: indigenous ecological knowledge is born from ideas and experiences, but then translated into remedies, cultivation, and so forth, which makes it more easily assessable and profitable, while intangible culture still remains an uncomfortable elusive concept that might have no economic value at all. Trade secret law can relatively protect indigenous knowledge that is secret and has not entered the public domain yet. This is mostly possible in those countries where trade secrets law is part of breach of confidence.

²⁰⁶ William Van Caenegem *Trade Secrets and Intellectual Property* (Wolters Kluwer, The Netherlands, 2014) at 75.

case law to cover personal information. Although the United States have inherited the common law system from England and the first settlers, in the case of trade secrets, the law is today mainly statute based and it only deals with civil liability. In 1985 the Uniform Trade Secrets Act (UTSA) was adopted in the majority of the United States. In doing so, the United States have created a separate right concerning commercial and technical secrets in place of a more general tort of breach of confidence. UTSA defines a trade secret as “information, including formula, pattern, compilation, program, device, method, technique or process that derive economic value from being secret”.²⁰⁷ For UTSA, the standard of secrecy is not absolute; information can circulate (although in limited manner), even if significant efforts must be made to keep the information confidential.²⁰⁸ Conversely, English law does not require establishing that some commercial value or advantage derives from secrecy.²⁰⁹ In general, trade secrets presents specific features that comprise of:

- the extent to which the information was known outside the business;
- the extent to which the trade secret was known by employees and others involved in the plaintiff’s business;
- the extent of measures taken to guard the secrecy of the information;
- the value of the information to the plaintiffs and their competitors;
- the amount of effort expended developing the information; and

²⁰⁷ UTSA Article 2(b) and 3(a).

²⁰⁸ “It may be that information circulates only amongst a small group, but if there is indication that this was by design, it will be difficult to establish that the requisite standard has been met. The standard of secrecy is also relative in the sense that even if a product is released into the public sphere, if reverse engineering requires considerable effort it will still be considered sufficiently secret” see Caenegem at 111; see also Julie Piper “I Have a Secret? Applying the Uniform Trade Secrets Act to Confidential Information That Does Not rise to the Level of Trade Secret Status” (2008) 12 *2 Marquette Intellectual Property Law Rev* 359.

²⁰⁹ “English law looks for value derived from the fact that the plaintiff has kept information secret and thus has a practical exclusivity, apart from whatever inherent utility or value the information might have. Partly that is because the action for breach of confidence does not only cover commercially sensitive information but also personal and private communication. Nonetheless, in English law, where a trade secret is at stake, the plaintiff might have to establish a number of things that have a similar tendency as the commercial value or competitive advantage requirement: first, particularization of the trade secret(s) concerned, i.e., precise and concrete identification; second, that the information is not so vague as to be impossible to identify with precision, and impossible to place in the public domain or not; and lastly, equity will not intervene to protect information that is old, stale or trite. In terms of reasonable measures, the English law does not advance this so much as a separate requirement, but more as a factor in determining two things: whether certain information amounts to a trade secret; and whether circumstances of its communication impose an obligation of confidence on the recipient” see Caenegem at 112.

- the ease with which the information could be acquired or duplicated by others.²¹⁰

In the case of personal information, trade secrets hold the same characteristics of confidential information.²¹¹ Yet, contrary to the separate tort of breach of confidence, jurisdictions protecting trade secrets focus more on the economic value of the information than the information per se. Given the fact that most of the times indigenous secret information has no economic value unless exploited and commodified, trade secrets law is of little help to protect any confidential knowledge that has been disclosed. Another limit of trade secrets laws is that, as of today, while there might be harmonization at the national level, there is not yet real harmonization in all the different developments of the law covering secret information at international level. Indeed, in some countries trade secrets law is protected by specific statutory provisions; while in others it is considered as part of confidentiality law. In English derived laws, the main issue still remains on what is the best way to protect the private information that is not necessarily a trade secret. In recent years, New Zealand has seen the emergence of a separate tort of invasion of privacy as a better way to progress things instead of keeping expanding artificially breach of confidence; while Australia has considered the introduction of a statutory tort of invasion of privacy, without reaching a clear solution over the matter.²¹² Thus, both jurisdictions still consider trade secrets as part of breach of confidence. In this way, the economic and spiritual value of indigenous information may remain included within the information itself, without the need to define its economic value in order to decide if the information can be protected by breach of confidence or not. It is rather the context, the tradition and use of such knowledge that determine its intrinsic value and not its commercial translation for the public. The context in which the information is found, therefore, represents the key factor.

²¹⁰ See Dean at para 3.115.

²¹¹ They include: "the extent to which the information has come to the widespread attention of the public at large which will depend upon the medium of communication used; the extent to which the plaintiff had sought to keep the information private; and the nature of the information and the sensitivity of the plaintiff to the information" see Dean at para 3.115.

²¹² According to Van Caenegem: "The comparison between England and Australia is most apt because in neither country does the criminal law come directly to the aid of the possessor of trade secrets as it does in the US, and for instance also in New Zealand" at 93.

The next section will explain how and why.

10.8 – The Contextual Integrity of Indigenous Knowledge

These days, researchers (and stakeholders who might finance research on ecological knowledge) are still very interested in indigenous information. While part of the humanity is going toward a technological era where everything seems to be controlled by machines, many researchers are still fascinated by the traditions of indigenous peoples. Indigenous peoples, indeed, seem to be the ones placed in between modern time and ancient time when the traditions were more closely connected to nature and the sense of community. Even the indigenous communities that have embraced modernity, still have access, through the elders and the guardians, to the knowledge that made their culture and their peoplehood. Being still the object of so much attention, indigenous peoples need to know how to protect themselves and which laws are better suited to do so. The fact that studies on indigenous peoples are important to understand the ancient traditions that today survive does not imply that all information related to them should be brought to the public domain. Like any other legal entity, indigenous peoples have the right to control what of their information can or cannot enter the public domain and be known by people who might be interested in their traditions. Mere cultural interest on alien traditions cannot justify the erosion and public display of cultures whose sharing was done in confidential contexts and not for public purposes. And yet, even when information reaches the public, according to *Gurry*, it is a matter of degree how much of the disclosed information can destroy any claim of confidentiality. As we have seen in section 10.6, in some cases, even if part of the confidential information has reached the public, it still retains its confidential status.²¹³ While many indigenous societies today know the law, many are still quite unprepared to face the possible exploitation done by researchers coming from the outside. Their position is quite critical. Researchers cannot use ignorance to trump any legal right of which these indigenous communities are totally oblivious. Whether

²¹³ See *Gurry* at para 5.27.

these communities know it or not, a trust of confidentiality implicitly exists among researchers and indigenous holders of secret information. According to Martin and Jeffery,²¹⁴ the legal position of indigenous peoples in jurisdictions based on the English common law system is far stronger than it is generally believed to date.²¹⁵ In their view, researchers have a “high standard of accountability to identify and remain within the bounds of use that are consistent with (perhaps unstated) preferences of the Indigenous custodians”.²¹⁶ In fact, conversations between researchers and indigenous custodians are notably built on trust.²¹⁷ Although many of the elements of contract are often present (express or implied contract),²¹⁸ the implications of the agreement and of the consensual passing of the information is often understood and agreed by only one party, notably the most vulnerable one who is less likely to be equipped to understand it.²¹⁹ Indeed, according to Hartzog,²²⁰ “implied obligation of confidentiality can protect people revealing harmful information when explicit promises of confidentiality were not obtained”. He explains that obligations of confidentiality do not need to be explicitly framed. “They can be implicit parts of confidential relationships or created through implied agreements of confidentiality”.²²¹ When researchers approach indigenous peoples to investigate indigenous traditions, a ‘fiduciary relationship’ is established. Contrary to common law on confidentiality, the ‘fiduciary relationship’ that is established is implicitly embodied not only in the relationship itself, but also in the ethical code of conduct that is morally and professionally imposed on

²¹⁴ Paul Martin and Michael Jeffery “Using a legally Enforceable Knowledge Trust to Fulfil the Moral Obligation to Protect Indigenous Secrets” (2007) 11 *NZ J Env'tl L* 1.

²¹⁵ According to Martin and Jeffery, in two jurisdictions such as the Australian and the America, although there are differences, the “enforceable rights to protect Indigenous secrets arise from a ‘cocktail’ of long-standing common law principles, combined with statutory instruments which refine and develop long-standing civil rights. These legal protections apply to many research transactions, the combined effect being to impose legal duties on most occasions when researchers obtain secret knowledge from Indigenous peoples. This network of legal obligations creates a significant governance responsibility for the institutions who employ these researchers” at 3.

²¹⁶ At 9.

²¹⁷ According to Martin and Jeffery “at least on one side of such transactions the intention is to lead the other party to disclose information that is valued by both the Indigenous custodians and the researcher” *supra* at 10-11.

²¹⁸ “Express contract is a contract in which all elements are specifically stated (offer, acceptance, consideration), and the terms are stated, as compared to an ‘implied’ contract in which the existence of the contract is assumed by the circumstances” at <<http://dictionary.law.com/Default.aspx?selected=703>> last visited on 05/5/2015.

²¹⁹ See following sections of the chapter.

²²⁰ Woodrow Hartzog “Reviving Implied Confidentiality” (2014) 89 *2 Indiana Law Journal* 763 at 767.

²²¹ See Hartzog at 768.

anthropologists and researchers.²²² Such codes of conduct imply a ‘duty of loyalty’ that is intrinsic in the role of any researcher. This duty of loyalty includes an obligation not to reveal information, and especially those known to be spiritually and culturally sensitive.²²³ The circumstances in which these studies are carried out are quite explicative of the terms that must be taken into consideration. First of all, many researchers are aware of the traditions of the community they intend to study; second, most of the time, they know the customary laws and the protocols that regulate the life of the community; third, the fact that some knowledge/information can only be obtained from the guardians of knowledge, a restricted group of selected people, already implies that the knowledge is under some formal obligation of confidentiality that binds the whole community.²²⁴ If that were not the case, the information would not need to be guarded. The context itself imposes that a reasonable person would “conclude that an agreement of confidentiality was implied or whenever a fiduciary relationship exists”.²²⁵ In other words, while indigenous guardians expect some level of privacy and confidentiality while sharing their knowledge or part of it, privacy violations happen when “context-relative information norms” are not respected in violation of the contextual integrity surrounding the sharing of the information.²²⁶ The idea of contextual integrity is posited by Nissenbaum.²²⁷

Whether a particular action is determined a violation of privacy is a function of several variables, including the nature of the situation, or context; the nature of the information in relation to that context; the roles of agents receiving

²²² See also WIPO *Resources for Researchers and Field-Workers* at <www.wipo.int/tk/en/databases/creative_heritage/researchers/> last visited on 03/11/2015.

²²³ See Brazilian Association of Anthropology *The anthropologist's code of ethics* (2005) at <www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/wcaa_brazilian_anthropology.pdf>; see also The World Council of Anthropological Association at <www.wcaanet.org> last visited on 03/11/2015.

²²⁴ Woodrow Hartzog “Reviving Implied Confidentiality” (2014) 89 2 *Indiana Law Journal* 763; see also Paul Sillitoe *Indigenous Studies and Engaged Anthropology: The Collaborative Moment* (Ashgate, 2015); Laurence Goldman *Social Impact Analysis: an Applied Anthropology Manual* (Bloomsbury Publishing Plc, London, 2000); John Monaghan and Peter Just *Social and Cultural Anthropology* (Oxford University Press, New York, 2000).

²²⁵ See Hartzog at 774.

²²⁶ At 775.

²²⁷ Helen Nissenbaum “Privacy and Contextual Integrity” (2004) 74 *Washington Law Review* 119 at 155.

information; their relationships to the information subjects; on what terms the information is shared by the subject; and the terms of further dissemination.

Nissenbaum specifies that the context, actors, attributes and transmission principles are very important in detecting whether there is a reasonable expectation of confidentiality and privacy in any relationship of trust established between a confidant and a confider (see next sections).²²⁸ Secrecy in indigenous rituals creates a context that implicitly implies that a confidence or restricted information is being shared under the trust that the confidant will maintain the same level of secrecy. Anthropologists and researchers can discuss that no formal agreement of confidentiality was ever made before entering into secret confidences. However, although the parties' perception of confidentiality are important in establishing any obligation of confidence, the circumstances, location and secrecy of the information that has been imparted obviously entail a level of confidentiality that cannot be defeated by any contradicting arguments. If the secrecy were not in place, most of the researchers would not need to enter into a relationship of trust with indigenous guardians. Moreover, according to Hartzog, "if the discloser of information was inherently vulnerable, had fewer resources, had less bargaining power, or was less sophisticated than the recipient, then an implied obligation of confidentiality was more than likely than with similarly situated parties".²²⁹ In the Australian case *SmithKline & French v Department of Community Health*²³⁰, the Court held that a number of factors are crucial in determining the scope of the obligation of confidentiality:

... whether the information was supplied gratuitously or for consideration; whether there were any past practices that gave rise to an understanding that the use was limited; how sensitive the information was; whether the confider had any interest in the purpose for which the information was to be used; and whether the confider expressly warned the confidant against a particular disclosure or use of the information.²³¹

²²⁸ See Nissenbaum at 141.

²²⁹ See Hartzog at 776.

²³⁰ *SmithKline & French v Department of Community Health* [1990] FSR 617 at 646.

²³¹ Lionel Bently *Intellectual Property Law* at 1173-1174.

As it will be discussed in the next section, in most cases the cultural context in which the disclosure of the information happens includes most of the factors just described.

10.9 – Implied Obligation of Confidentiality

Given the asymmetry of the cultural status of the indigenous confider and the receiver of the information, it is unlikely that a formal agreement of confidentiality or contract is stipulated between the parties prior to the disclosure of the secret information. The receiver of the secret information might therefore claim that no evident agreement was ever stipulated; consequently, the confider and confidant were never formally bound to confidentiality. In this scenario, the law of breach of confidence comes to help. In general, the test to evince that the information was acquired in circumstances that ‘implied’ evident or assumed confidentiality indicate (objective) knowledge that the information was indeed confidential. They include:

- the nature of the information (eg trivial, banal, commercially valuable or intimately personal, secret and inaccessible);
- the steps taken by the confider to preserve or emphasize the secrecy of the information (eg if special care has been taken that a restricted disclosure is not in place);
- the manner in which the information was disclosed or obtained (eg surreptitiously and so forth);
- the understanding of the parties involved; and
- more importantly in the case of indigenous secret information – where the information is “disclosed for a specific, limited purpose and it is understood, from a legal and cultural context of the disclosure, that the information will not be used for another purpose”.²³²

²³² See *Gurry* at para 7.03

Following the points listed above, the nature of indigenous secret information is never trivial, although it might not have intrinsic economic value; the fact that it is kept secret and managed by custodians indicates its sensitive nature; it can be disclosed only in contexts of confidentiality regulated by customs; the parties will probably be involved in an asymmetric relationship where the indigenous custodian knows that the information is secret, but fails to enter into a contract/agreement with the confidant who, however, can evince the nature of the information by the context in which he receives it; and the information might be shared in a private cultural context where the custodian decides, for disparate reasons, to share the information. The sharing is often due to generosity, naiveté or ignorance which may vary from one context to another.

Many of the most vulnerable scenarios involving indigenous confiders happen in contexts where no formal confidentiality agreement was ever stipulated with the confidant. In these scenarios, the indigenous confider can count on the notion of 'implied confidentiality' which can a fortiori protect people revealing harmful or secret/sacred information when an explicit confidentiality agreement was not obtained. In this case, obligations arise out of customs, norms, and "other indicia of confidentiality beyond explicit confidentiality agreement"²³³ (such as the ethical code of anthropologists, journalists and researchers). Hartzog states that implied confidentiality agreements "arise when individuals *actually* objectively agree to confidentiality, but the understanding is implied in lieu of an explicit agreement".²³⁴ The implied agreement includes any fiduciary relationship based on a duty of loyalty, which includes an obligation not to reveal information.²³⁵ McClurg specifies that "promises can be made orally or in writing, or can be inferred from conduct";²³⁶ as such, he carries on, "no difference in legal effect between express and implied contracts exists. The distinction lies in how assent to the contract is manifested".²³⁷ The implied obligation of confidentiality

²³³ See Hartzog at 768.

²³⁴ At 770.

²³⁵ Roy Ryden Anderson "The Wolf at the Campfire: Understanding Confidential Relationships" (2000) 53 *SMU L Rev* 315 at 317.

²³⁶ Andrew J McClurg "Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality" (2006) 74 *Cin Law Rev* 887 at 912.

²³⁷ "The central features of an implicit promise of confidentiality, shared by all [intimate, fiduciary, and otherwise confidential] relationships, include (1) confidentiality is reasonably expected as a matter of custom and general understanding; (2) people part with private information in reliance on this expectation

includes two fundamental aspects: party perception and inequality. In other words, how the parties perceive their fiduciary relationship and how they use any existing asymmetry or inequality to impair the relationship at the advantage of one of the parties, and usually the strongest one. The context in which the relationship of confidence happens is a key factor in defining the relationship itself. The theory of 'contextual integrity'²³⁸ created by Nissenbaum (briefly introduced above), not only expands and clarifies aspects of privacy that have traditionally been obscure or uncertain, but explains how a fiduciary relationship of confidentiality should be assessed. She defines the parameters that every civilized society should take into account when evaluating cases involving privacy and confidentiality.

This thesis makes use of her theory not only because it is very thorough, precise, ethically and legally correct, but also because, by taking into account the social and cultural circumstances in which a confidential agreement takes place, the theory gives contextualized discernments by which the facts and the parties involved should be assessed. In her book Nissenbaum²³⁹ laid down a theory that, once adopted, would bring broader parameters to evaluate cases involving the laws of privacy and confidentiality. According to her, privacy and confidentiality violations happen when "context-relative information norms" are not respected during confidential sharing.²⁴⁰ The framework laid down by Nissenbaum responds to four basic questions:

- what was the context surrounding the disclosure?
- what was the nature of the information?
- who were the actors and what was their relationship?
- what were the internal and external terms of disclosure?

(in many cases, detrimentally changing their position in doing so); and (3) trust in the confidentiality of private information is necessary to make the relationship function properly" see McClurg at 913.

²³⁸ "Context-relative information norms function descriptively when they express entrenched expectations governing the flows of personal information, but they are also a key vehicle for elaborating the prescriptive (or normative) component of the framework of contextual integrity" see Helen Nissenbaum "Privacy and Contextual Integrity" (2004) 74 *Washington Law Review* 119 at 129 and Helen Nissenbaum *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford University Press, Stanford, 2009).

²³⁹ Helen Nissenbaum *Privacy in Context: Technology, Policy and the Integrity of Social Life*.

²⁴⁰ See Nissenbaum at 129.

Nissenbaum identifies the variables that form contextual integrity as: context, actors, attributes and transmission principles. These variables “prescribe, for a given context, the types of information, the parties who are the subject of the information as well as those who are sending and receiving it, and the principles under which this information is transmitted”.²⁴¹ Hartzog adjusts Nissenbaum’s definition of context to apply to indigenous peoples. According to him, context should be defined as “the relationship between the actors to a disclosure; any external circumstance affecting the actors to a disclosure; the nature of the information disclosed; or the terms of disclosure”.²⁴² In other words, the focus should be on the relationship of confidentiality (as seen, it is obviously asymmetrical in the case of indigenous peoples and researchers) and the external circumstances that surround the confidence. Long-standing, developed relationships are generally more likely to give rise to an “implied obligation of confidentiality because a developed relationship likely involves trust and custom”.²⁴³ Nissenbaum defines contexts as “structured social settings characterized by canonical activities, roles, relationships, power structures, norms (or rules), and internal values (goals, ends or purposes)”.²⁴⁴ Limiting the circulation of knowledge, secrecy and the presence of the custodians within indigenous societies create an obvious context in which is inferred that any information obtained is restricted and can be imparted only confidentially. The fact that researchers meet the guardians in their environment prove that the information they are seeking is not naturally accessible (eg in the public domain), but needs to be acquired in a specific and culturally sensitive environment and after some relationship based on trust or confidence has been established between the parties. In this scenario, any ‘reasonable person’ receiving the information must have been aware that the information was disclosed in confidence and received in trust.²⁴⁵ Additionally, it is fair to say that ‘secrecy’ is a

²⁴¹ Helen Nissenbaum “Privacy and Contextual Integrity” (2004) 74 *Washington Law Review* 119 at 155.

²⁴² See Hartzog at 776.

²⁴³ See Hartzog at 777.

²⁴⁴ Helen Nissenbaum *Privacy in Context: Technology, Policy and the Integrity of Social Life* at 132.

²⁴⁵ According to Hartzog “if confidentiality was a regular and accepted practice in a given context, courts often found a discloser’s reliance on that custom reasonable. This reliance was reasonable because the common knowledge of a custom make it likely that the recipient of the information was aware of an expectation of confidentiality before the information was disclosed, or, in any event, the recipient should have known to keep the information confidential” at 779.

well-known and established custom in every society of the world. The claim that the receiver did not know that the secret was imparted in a context of confidentiality cannot be accepted as a reasonable argument, because the context itself proved that secrecy attached to the information existed.²⁴⁶ Moreover, in researches involving indigenous custodians, receivers enter into negotiations or relationships of trust with the discloser before the information is actually shared. Such relationships can last months or years. In this case, the actors are well known and play important roles. Nissenbaum states that “informational norms have three placeholders for actors: sender of information, recipients of information, and informational subject”.²⁴⁷ In her view, the roles performed by the actors are among “those critical variables that affect people’s rich and complex sensibilities over whether²⁴⁸ privacy has been violated or properly respected”.²⁴⁹ As introduced, normally courts consider the perception of confidentiality as the most important factor in determining implied confidentiality. However, second to the perception factor, the other parameter usually analysed in great detail in any confidentiality/privacy case is whether there is any inequality between the parties/actors. According to Hartzog, in fact, “if the discloser was inherently vulnerable, had fewer resources, had less bargaining power, or was less sophisticated than the recipient, then an implied obligation of confidentiality was more likely than with similarly situated parties”.²⁵⁰ Mentioning *Wildearth Guardians v US Forest Service* case,²⁵¹ Hartzog states that “vulnerability and an imbalance of power or sophistication were the most significant actor-related factors for courts analysing obligation of confidence”.²⁵² In this case, the role played by the actors involved becomes even more crucial. Nissenbaum believes that the “capacities in which actors function are crucial to the moral legitimacy of certain flows of information”.²⁵³ In other

²⁴⁶ See next section of this chapter.

²⁴⁷ “Sender and receiver placeholders might be filled respectively by single individuals, multiple individuals, or even collectives such as organizations, committees, and so forth” see Helen Nissenbaum *Privacy in Context: Technology, Policy and the Integrity of Social Life* at 141.

²⁴⁸ At 142.

²⁴⁹ Supra.

²⁵⁰ See Hartzog at 776.

²⁵¹ *Wildearth Guardians v US Forest Service* High Country Conservation Advocates v United States Forest Service, 52 F Supp 3d 1174 (D Colo 2014).

²⁵² See Hartzog at 791.

²⁵³ Helen Nissenbaum *Privacy in Context: Technology, Policy and the Integrity of Social Life* at 142.

words, it is important to examine, case by case, the way actors behave in contexts entailing confidentiality. Behaviours and attitudes might indeed vary depending on the situation and the ‘attributes’ possessed by the information. Aside from the role played by actors, Nissenbaum gives great importance to the attributes (type or nature)²⁵⁴ of information. In other words, what information is about. The attributes assess the level of sensitivity of the information and explain why it is kept secret or guarded by the discloser. The attributes also include the reasons why the information needs to be kept confidential and why it can possibly be harmful if disclosed. If the information is of a spiritual nature (which is mostly the case in indigenous communities), its disclosure would obviously cause moral and spiritual harm to the guardian and to the rest of the community which was customarily excluded from such knowledge. Hartzog explains that implied obligations of confidentiality exist “in situations involving information that, if disclosed, could harm a vulnerable party”.²⁵⁵ The attributes of the information determine the harm that a vulnerable party might receive by the disclosure after a transmission of information has occurred. In this scenario, the ‘transmission principles’ represent the way the information is distributed, disseminated or transmitted from party to party within a confidential context.²⁵⁶ In the case of indigenous peoples, the discloser shares his knowledge because the receiver has won some level of trust. The information is mostly orally transmitted or recorded in photographs, images or videos if the discloser had previously agreed to be photographed, recorded and so forth. The transmission is based on the sharing of information. Often, like in the cases of rituals that are performed within indigenous communities, the sharing might be represented by the active participation of the receiver in the ceremonies. Again the context comes to help. If no verbal warning has been made before the beginning of a ceremony, for example, the receiver can evince the sensitivity of the information to which he is about to be revealed by the secrecy surrounding the occasion and the limitations that the custodians impose on other members of the community who are denied participation. On the other hand, a “potential recipient’s vague

²⁵⁴ At 142.

²⁵⁵ See Hartzog at 786.

²⁵⁶ See Nissenbaum *Privacy in Context: Technology, Policy and the Integrity of Social Life* at 145.

reassurance to the discloser that the information will be protected could form an implied obligation of confidentiality' to the discloser who allows the participation in the ceremony".²⁵⁷

In conclusion it can be agreed with Hartzog when he suggests that "the expectations of the parties are typically determined by examining 'the totality of the circumstances' and may be 'shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances'".²⁵⁸ In this regard, *Foster v Mountford*²⁵⁹ contains all the elements and parameters analysed above.

10.9.1 - *Foster v Mountford*: A Ground-breaking Case

Foster v Mountford is the first Australian decision in which the Supreme Court of the Northern Territory took into account "Aboriginal customary rights to culturally defined notions of secrecy".²⁶⁰ In brief: Mountford was an Australian ethnographer who began his work without much formal education in anthropology.²⁶¹ During most of the 1940s Dr Mountford was allowed access to sacred/secret ceremonies performed by the Pitjantjatjara tribe with the mutual understanding that the access was granted in a context of secrecy and confidence. Unfortunately, years later, Mountford published an anthropological text, *Nomads of the Australian Desert*, in which he disclosed many of the secret practices of the Pitjantjatjara people that he had learnt in a secret, confidential context. The Pitjantjatjara people brought the case to court specifying that the text was reporting information which had been imparted in confidence and the spreading of Pitjantjatjara secret and spiritual ceremonies would cause great harm to the community. To their advantage, in his book, after the acknowledgment, Mountford had written a few lines in which he confirmed his knowledge of the secret and confidential nature of the information he was about

²⁵⁷ See Hartzog at 797.

²⁵⁸ See Hartzog at 800.

²⁵⁹ *Foster and Others v Mountford and Rigby Ltd* (1976) 14 ALR 71.

²⁶⁰ *Supra* at 110.

²⁶¹ For detailed reading on the subject, see Christoph Antons "Foster v Mountford: Cultural Confidentiality in a Changing Australia" in AT Kenyon, M Richardons and others *Landmarks in Australian Intellectual Property Law* (Cambridge University Press, Melbourne, 2009) at 110-125.

to unfold in the book. While, he did not mention whether any formal agreement on confidentiality was ever stipulated, from his words it is obvious that he was aware of the sacred/secret nature of the information.²⁶² Through those introductory lines, the Court acknowledged that Mountford had admittedly participated in secret ceremonies in a confidential context and that the book would reveal secret information that could cause great damage of a serious nature to the community. Consequently, the Supreme Court (NTSC) granted an injunction to stop the disclosure, publication and sales of *Nomads of the Desert* in the Northern Territory.²⁶³ In granting an injunction, Justice Muirhead recognised the confidential nature of the disclosure and the cultural harm that such disclosure could bring to the Pitjantjatjara people. In this regard he stated that:²⁶⁴

... the defendant, Dr Mountford, many years ago, was shown things and places, and given information in confidence, by people, and on occasions which perhaps cannot now be identified, save in terms of general community, and in terms of the period. I find the plaintiffs have made out a prima facie case that these secrets may, by continuing publication of the book in the Northern Territory, be revealed to those to whom it was always understood it would not be revealed, and that continuance of such publication in the Northern Territory and of course perhaps elsewhere, may cause damage of serious nature, damage of a type to

²⁶² "Where Australian aborigines are concerned, and in areas where traditional aboriginal religion is still significant, this book should be used only after consultation with local male religious leaders. This restriction is important; it is imposed because the concept of what is secret or may not be revealed to the uninitiated in aboriginal religious belief and action, varies considerably throughout the Australian Continent and because the varying views of aborigines in this respect must, on all occasions be observed" see *Foster and Others v Mountford and Rigby Ltd* [1976] 14 ALR 71 WL 46 225, 46 235.

²⁶³ According to Antons "the anthropologist gave evidence that in his experience the information revealed could only have been supplied and expose in confidence. The judge took Mountford's own caveat at the beginning of the book as confirmation that the author was well aware that the book contained secret-sacred materials. It was this understanding rather than 'evidence by document or conversation or indeed by recognized legal relationship' that persuaded the judge to grant the injunction based on breach of confidentiality. Neither *Nomads of the Australian Desert* nor the description of the 1940 expedition in Mountford's biography expressly refer to restrictions imposed on Mountford at the time the knowledge was revealed. However, *Nomads of the Australian Desert* contained detailed sections on 'sacred objects'. Further, both *Nomads of the Australian Desert* and Mountford's biography mention that during the expedition Mountford and his young companion Lauri Sheard were allotted totems and tribal relationships within the organisation of the Pitjantjatjara; the became totemically associated with the land. This association, in the view of the Pitjantjatjara, would have brought him rights as well as responsibilities and obligations towards maintaining and observing their customs and laws" see Christoph Antons "*Foster v Mountford: Cultural Confidentiality in a Changing Australia*" at 121.

²⁶⁴ *Foster and Others v Mountford and Rigby Ltd* (1976) 14 ALR 71 at 236-237.

which monetary damages are irrelevant, and to which are not, in fact, claimed in this action.

More importantly, Justice Muirhead's judgement is of great relevance because he formally recognised that the plaintiffs, in the persons of the members of the Council,²⁶⁵ were entitled to proceed in the action for breach of confidence.²⁶⁶ According to *Gurry*, although Muirhead's conclusion is not clear, it might be identifiable on the basis that "entitlement to know the secrets brought with it an entitlement to sue to protect them".²⁶⁷ In other words, in *Foster v Mountford* there is a "shared entitlement to knowledge and use of the community secrets and this, in turn, gave rise to obligations of confidence owed to individuals within that community".²⁶⁸ In other words, the members of the Council could rightfully bind Mountford to a confidentiality agreement he was requested to maintain over the years. After the hearing, the Northern Territory Supreme Court of Australia granted an ex parte injunction which, although only limited to the Northern Territory, remains of fundamental importance because it recognised the 'relative secrecy' nature of the information which was known and distributed among 'insiders' but remained restricted to 'outsiders'. In addition to that, the case also demonstrated that an appropriate remedy for breach of confidence could be granted in cases presenting a breach of 'cultural privacy' whose disclosure could greatly harm the community involved.²⁶⁹ It was also a case in

²⁶⁵ "The Pitjantjatjara Council Aboriginal Corporation is an organisation of all Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara people and their communities and outstations in Western Australia, South Australia and the Northern Territory, covering an area of around 350,000 square kilometres. Communities and homelands extend from Coober Pedy in South Australia to west of Warburton in Western Australia, and include Docker River, Mutitjulu, Imanpa and Finke in the Northern Territory. The Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara people formed the Pitjantjatjara Council in 1976. The Council became the focal point for political and land-based discussions and negotiations with governments and the mining industry. It was the group through which decisions were made and negotiations conducted with the South Australian Government in relation to the Pitjantjatjara Land Rights Act. The primary objective of the Pitjantjatjara Council is to aid wherever and whenever possible, the well-being of its Members (NPY people and communities) and their culture. The Council's objectives are to develop appropriate means of managing their traditional land within the Council area and in so doing to assist in alleviating the significant social and economic problems of Members. It also aims to arrest the social disintegration within NPY Communities by ensuring that programs and actions are in accordance with Members' cultural values and practice' and it promotes improved educational opportunities for Members and their families" see electronic document <<http://pitjantjatjaracouncil.com.au/>> last visited on 12/11/2015.

²⁶⁶ *Foster and Others v Mountford and Rigby Ltd* (1976) 14 ALR 71 at 75.

²⁶⁷ *Gurry* citing *Mid-City Skin Cancer and Laser Centre v Zahedi-Anarak* [2006] NSWSC 844; (2006) NSWLR 569 at 206.

²⁶⁸ See *Gurry* at para 8.19.

²⁶⁹ "The contention that the plaintiffs as individuals, and their people, will suffer damage and dislocation if some sections of the book come into the hands of the uninitiated, is a consequence I cannot now ignore,

which the public interest defence did not justify disclosure, or that the argument that the book was of 'public interest' (see next section) as a document which would preserve the justice of a dying and vanishing culture, proved to have little standing. According to Muirhead, "despite Mr Mountford's prognosis that their life and beliefs 'are quickly vanishing', there is still an urgent desire in these people to preserve those things, their lands and their identity, and the existence of the council [of the elders] itself illustrates these objectives".²⁷⁰ In 1985 a second suit was filed by the Pitjantjatjara Council for the removal of images taken by Mountford during sacred and secret ceremonies. Also in that case, an injunction was awarded.²⁷¹

10.9.2 – The Public Interest Defence and the Freedom of Expression Argument Do Not Apply to Indigenous Secret Knowledge

In general, the 'public interest' is distinct from something that interests the public or that the public is curious about. As such, the information must not be just interesting to the public, but properly within the public interest. In other words, the nature of the information must be of legitimate concern to the

not only because of one's lay recognition gained by service in the territory of the significance and purpose of initiation, but also because of the possible consequences of even accidental acquisition of knowledge of such matters by women and uninitiated ..." see *Foster and Others v Mountford and Rigby Ltd* (1976) 14 ALR 71 WL at 46 236; Christoph Antons "*Foster v Mountford: Cultural Confidentiality in a Changing Australia*" at 116.

²⁷⁰ *Foster and Others v Mountford and Rigby Ltd* [1976] 14 ALR 71, 72.

²⁷¹ "Representatives of the Pitjantjatjara Council came to Melbourne on 25 March and on the afternoon of that day issued a generally endorsed writ (No 1796 of 1982) and a summons in chambers seeking injunctions to restrain the owner of the slides (Mr Lowe) and the auctioneer from displaying or selling the slides. The general endorsement pleaded that the slides were taken by Dr Mountford as confidential information for his own personal use, and not otherwise. Affidavits in support of the application were made by Peter Nganingu, the second-named plaintiff and a member of the Pitjantjatjara people, and by Daniel Vachon, an anthropologist employed by the Pitjantjatjara Council. Interlocutory orders were made requiring the defendants to deliver up possession of any slides that related to or recorded any of the philosophical or religious traditions of the Pitjantjatjara people to the Supreme Court Prothonotary and restraining the defendants from selling or displaying the slides. These orders enabled the slides to be inspected by representatives of the Pitjantjatjara Council who selected the slides dealing with secret/sacred material. Subsequently final orders were made declaring that the property in and ownership of these selected slides, photographs and negatives vested in the Pitjantjatjara Council for and on behalf of the Pitjantjatjara, Yankuntjatjara and Ngaanyatjara peoples" see Pitjantjatjara Council Inc and *Peter Nganingu v John Lowe and Lyn Bender* (Injunction to prevent display and sale of photographic slides - slides from collection of late Dr C Mountford - slides showing secret ceremonies) [1982] Aboriginal Law B 30; (1982) 1(4) Aboriginal Law Bulletin 10 electronic document <www.concernedhistorians.org/content_files/file/LE/291.pdf> last visited on 12/11/2015.

public.²⁷² In *Woodward v Hutchins* Lord Denning MR argued that “in these cases of confidential information it is a case of balancing the public interest in maintaining the confidence against the public interest in knowing the truth”.²⁷³ In other words, the court should engage in an unstructured balancing exercise in which the general discretion of the court to enforce or not confidentiality would become of crucial importance. On the public interest clause, the Law Commission commented that:²⁷⁴

The range of circumstances in which the defence might properly be used is so wide and so variable that it is not practicable to define in general terms all the criteria to be used and it would be misleading to single out particular issues ... for consideration ... The public interest is a developing concept which changes with the social attitudes of the times.

Public interest is today the strongest defence available to defendants who are accused of breach of confidential relationships. A defendant can, in fact, escape liability if he/she can establish that the disclosure was justified in the public interest.²⁷⁵ According to Bently, while it is difficult to circumscribe what can be rightly claimed to be in the public interest, there are a few factors that come to aid in determining if the ‘public interest’ justification can be rightly claimed by any defendant: the nature of the information (reporting misdeeds or information which are important to the country); criminal offences, civil wrongs, non-compliance with a legal obligation, miscarriage of justice; behaviours likely to endanger health or safety; damage to the environment and so forth.²⁷⁶ While a level of flexibility is justifiable, however, the law does not permit “the unauthorized disclosure of information that is merely ‘interesting to the

²⁷² Jessica Christine Lai *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer, Switzerland, 2014) at 175 citing *Hosking v Runting* [2005] 1 NZLR 1 para 133 Gault Paul and Blanchard J; *TV3 v Broadcasting Standard Authority* [1995] 2 NZLR 720, 933; see also Lionel Bently *Intellectual Property Law* Part V on Confidential Information; see Gurry at Chapter 13 para 13.35 and Chapter 8.

²⁷³ *Woodward v Hutchins* [1977] 1 WLR 760 (CA).

²⁷⁴ Law Commission *Working Paper on Breach of Confidence* No 58 (1974) at para 93.

²⁷⁵ In *Campbell v Frisbee* [2002] EMLR 31 Lord Phillips stated that “the right of confidentiality, whether or not founded in contract, is not absolute. That right must give way where it is in the public interest that the confidential information shall be made public” at 23.

²⁷⁶ Lionel Bently *Intellectual Property Law* at 1181.

public’”.²⁷⁷ In other words, the law does not protect information that has no direct social relevance or prevent and report any misdeed. In *Fraser v Evans* Lord Denning specified that “no person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so”.²⁷⁸ The type of obligation involved in the confidence is another important factor that is likely to play an important role in determining if the public interest clause is acceptable as a defence. Stanley recognises five overlapping ways in which it can be assessed whether a public interest can be claimed:²⁷⁹

- where there is a contract between the claimant and the defendant, as a principle employed in construing an express contractual obligation of confidentiality;
- where there is a contract between the claimant and the defendant, as a principle employed in deciding whether an express contractual obligation of confidentiality is contrary to public policy;
- where there is a contract between the claimant and the defendant, in deciding the extent to which the claimant has a reasonable expectation of confidentiality; and
- where the claimant seeks an equitable remedy, in deciding whether that remedy should as a matter of discretion be awarded, or in applying the maxim that the equitable claimant must have ‘clean hands’.

Another factor of great importance in determining if the disclosure in the public interest is acceptable depends on the party to whom the information is disclosed. Some information can, in fact, be disclosed to one person or group but not to another. In *Foster v Mountford*, it might have been acceptable that Foster disclosed the information to selected colleagues interested or involved in similar research, but not to the public at large whose lives would not be in danger if the information were not disclosed, or were in great need to acquire such secret information. It is clear that one of the reasons for publishing *Nomads of the*

²⁷⁷ At 1181; see also Paul Stanley *The Law of Confidentiality: A Restatement* at Chapter 11.

²⁷⁸ *Fraser v Evans* [1969] 1 QB 349 at 361.

²⁷⁹ Paul Stanley *The Law of Confidentiality: A Restatement* at 55.

Desert was mostly based on the economic remuneration and the possible fame that would result from its publication. In this case, while receipt of remuneration cannot preclude the operation of the defence, “it may indicate that a defendant confused their own interests with those of the public”.²⁸⁰ On the same line of thought, Foster could not claim freedom of expression as defence. As seen in previous sections, while freedom of expression is today an important argument to be used as a defence for circulating information that should be kept confidential, it must always be asked: is there an interference with the right of respect for one’s private life? And whether the interference with that right is justified. Copying and reporting private, secret information of sacred, spiritual and cultural value, which are not of public importance or general interest cannot be justified by freedom of expression. Article 8 of the ECHR clearly states that “everyone has the right to respect for his private and family life, his home and his correspondence”. While Article 10 recognises freedom of expression as fundamental foundation of any civil society at 10.2 it states that:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In other words, such liberties are not absolute but subjected to legal restrictions where the reputation or rights of others are violated.

Western jurisdictions (especially in the United States)²⁸¹ value individual rights to the detriment of collective rights. As such, freedom of expression is protected

²⁸⁰ Lionel Bently *Intellectual Property Law* at 1188.

²⁸¹ See Article 10 of the European Convention on Human Rights (supra); and First Amendment of Constitution of the United States. “The First Amendment guarantees freedoms concerning religion, expression, assembly, and the right to petition. It forbids Congress from both promoting one religion over others and also restricting an individual’s religious practices. It guarantees freedom of expression by

above all because it represents a tool in the search for truth. However, as stated in Art 10.2 of the ECHR, the law not only protects free speech, but it is also designed to prevent, among other things, the perpetration of racial prejudice, misunderstanding and misrepresentation of indigenous peoples' traditions.²⁸² Consequently, the law must take into account the fact that free speech cannot win over the private life and expectations of any reasonable person who aims to protect his sensitive information from public scrutiny. Case law analysed in *Springer*,²⁸³ *von Hannover (No 2)* and *von Hannover (No 3)*²⁸⁴ demonstrates that while it is difficult to draw the line dividing freedom of speech/public interest from private interests, it also highlighted a few factors that are relevant to the balancing of the competing interests:

- the public profile of the claimant;
- the claimant's conduct prior to the threatened publications;
- the manner in which the information about the claimant's private affairs was obtained; and
- the content, form and potential for harm of the publication.²⁸⁵

Obviously, the publication of *Nomads of the Australian Desert*, along with the detailed descriptions of the Pitjantjatjara sacred/secret ceremonies, do not respond completely to the factors above mentioned. The Pitjantjatjara are not public figures; although well-known in Australia, they have always kept a very private life; the information was obtained in an obvious context entailing secrecy and confidentiality; and the harm caused by the disclosure of the information would greatly surpass the public interest clause. Indeed, the harm was undoubtedly proven. As such, the disclosure of secret knowledge of indigenous peoples cannot be justified either by the public interest or on the basis of freedom of expression. *Nomads* does not make any contribution to any existing

prohibiting Congress from restricting the press or the rights of individuals to speak freely. It also guarantees the right of citizens to assemble peaceably and to petition their government" <www.law.cornell.edu/constitution/first_amendment> last visited on 12/05/15.

²⁸² See chapter on indigenous peoples and international law.

²⁸³ *Axel Springer v Germany* App No 39954/08 [2012] 55 EHRR 6.

²⁸⁴ *Von Hannover (No 2)* App No 40660/08 [2012] (ECtHR); *Von Hannover (No 3)* App No 8772/10 [2014] EHRLR 61.

²⁸⁵ Lionel Bently *Intellectual Property Law* at 1183.

debate of general interest. Although not many people around the world know who the Pitjantjatjara people are and what their traditions are about and might not be interested in knowing the secret details of their knowledge, they are well known in Australia and the sharing of their secret traditions could be very harmful for the community. Apart from the advancement of very traditional knowledge whose disclosure might interest specialists and anthropologists, indigenous information might be 'curious and unusual' but have no social relevance for our modern global society.²⁸⁶ Such knowledge does not endanger our society or prevent harms of any kind. The only harms that the disclosure can cause are the ones inside the community that holds the information secret. Indigenous information is mostly intangible and is imbued with spiritual and traditional significances which could be exploited by defendants only for financial gain or personal interests. And these are not serious enough reasons to justify freedom of expression or public interest outweighing the protection of the confidential information. Having said this, it is important to remember that appropriation of indigenous culture often entails a level of deception, surreptitious appropriation and unlawful acquisition of traditional information or later-on breach of mutual terms of confidentiality that never entailed public disclosure of the information. The secrecy and the difficulty of acquiring the information prove that the information is private and only an established confidential relationship can convince the confider to reveal his knowledge. If the confidentiality was not in place, information sharing would not happen. Indeed, in indigenous societies sensitive confidential information does not circulate freely outside its original context. The best solution to prevent uncontrolled circulation of indigenous secret knowledge is to stop as soon as possible the disclosure and circulation of the information outside the original milieu. How can this be done effectively?

²⁸⁶ It is true that biological knowledge of natural remedies used by indigenous peoples might be of great importance for pharmaceutical companies, but in that case, there are better laws that might be used (see previous chapter).

10.10 – Remedies: Interim and Final Injunctions

Historically, the injunction was an equitable remedy and could only be granted by the High Court of Chancery. Today, courts can grant an interim or final injunction “in all cases in which it appears to the court to be just and convenient to do so”.²⁸⁷ There is one overriding requirement: “the applicant must have a cause of action in law entitling him to substantive relief”.²⁸⁸ This because an injunction “is not a cause of action (like a tort or a breach of contract) but a remedy (like damages)”.²⁸⁹ Given that injunctions are discretionary, rules apply when the granting of an injunction is under consideration:

- the claimants’ behaviour must be based on truthfulness and must not use deplorable means in pursuing an objective;²⁹⁰
- the relevance of malice from on the part of the defendant may properly influence the court to exercise its discretion in favour of granting an injunction;²⁹¹
- “an injunction will not be granted if it would be pointless or ineffective, but it is not the habit of the court, in considering whether or not it will make an order, to contemplate the possibility that will not be obeyed”;²⁹²
- “the very first principle of injunction law is that prima facie you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy”;²⁹³
- conversely, an injunction will be considered necessary if, for instance, “the injury cannot fairly be compensated by money – if the defendant has acted in a high-minded manner – if he has endeavoured to steal a march upon the claimant or evade the jurisdiction of the Court”.²⁹⁴

²⁸⁷ David Bean *Injunctions* (Sweet and Maxwell Ltd, London, 2004) at 4.

²⁸⁸ *Supra* at 4.

²⁸⁹ At 4.

²⁹⁰ “It is said that ‘he who comes to equity must come with clean hands’ which means that the application of a party with unclean hands is likely to fail” see *Armstrong v Sheppard & Short Ltd* [1959] 2 QB 384; see *Hubbard v Vosper* [1972] 2 QB 84.

²⁹¹ See *Bradford Corp v Pickles* [1895] AC 587.

²⁹² See Romer LJ in *Re Liddell’s Settlement Trusts* [1936] Ch 365 at 374, approved by the House of Lords in *Costanzo v Brown & Root (UK) Ltd* [1981] AC 552 at 574.

²⁹³ See Lindley LJ in *London & Blackwall Railway Co v Cross* [1886] 31 Ch D 354 at 369.

²⁹⁴ See Lord Macnaghten in *Colls v Home & Colonial Stores Ltd* [1904] AC 179 at 193.

Equity law can award compensation for disclosure which has caused great emotional distress to the confider. In most of the cases emotional distress is associated with serious invasions of privacy and breach of contract under normal contractual principles.²⁹⁵ Yet, under common law, damages are mostly applied where the obligation of confidentiality is contractual and involves obvious economic interests. In cases involving damages, the claimant desires a financial remedy or equitable compensation on account of profits involved in the disclosure of confidential information. However, as pointed out by Bently, the “measure of damages for breach of confidence should be tortious, reflecting loss to the claimant”.²⁹⁶

In general, damages should be assessed by reference to the market value of the information.²⁹⁷ In some cases, courts can award damages on account of distress and injury to feelings.²⁹⁸ However, reputation and the dignity of an individual are fundamental aspects of a person’s dignity in a democratic society, and there is no monetary compensation that can restore the dignity and reputation of a person once it is lost. In the case of indigenous peoples, the harms that the disclosure of confidential information can cause are multifaceted and complex in nature. While there are obvious components of embarrassment, humiliation, shame and guilt associated to the disclosure of secret information, the harm caused is not necessarily economic nor linked to intellectual property rights as such. The disclosure of the information outside the customary context has social, cultural and spiritual (sometimes esoteric) repercussions for the whole indigenous community whose damage, in many cases, cannot be restored by economic compensation. Often, in fact, the circulation of sensitive information can be as severe as to cause the undermining and loss of the identity of an indigenous community. In those cases where the information is already spread out, and injunctions could be of no use, damages can at least compensate the claimant of the part of the economic value that the information acquired once

²⁹⁵ Lionel Bently *Intellectual Property Law* at 1195.

²⁹⁶ Bently at 1195; “the most common financial remedy for infringement of intellectual property rights is an award of damages. The damages recoverable are the same as with other torts: the aim is to restore the victim to the position in which they would have been had no wrong been committed; the aim is not to punish the defendant” at 1256.

²⁹⁷ See Court of Appeal in *Seager v Copydex* (No 2) [1967] 2 All ER 415.

²⁹⁸ See Bently at 1195.

out in the market.²⁹⁹ Nonetheless, given the highly sensitive nature of indigenous secret knowledge, most of the time, and especially in those cases where the information is not already widely circulating, damages do not constitute an appropriate remedy. Whereas injunctions can represent the most valuable and effective alternative. Generally, applications for injunctive relief to restrain publication and disclosure of information are commonly used in cases involving defamation and breach of confidence. They represent the primary remedy that a claimant is more likely to pursue in case of disclosure or possible disclosure of private/confidential information; the injunction restrains the use or disclosure of the information. In the *American Cyanamid*³⁰⁰ case the general test for injunctions was established to define that, in case of breach of confidence, the courts will exercise their discretion to grant or withhold interim relief on the basis of the 'balance of convenience'.³⁰¹ The first test was to assess whether there was a serious question to be tried and, secondly, whether damages would be an adequate remedy for the injured party.³⁰² According to Bently, the balance of convenience requirement "almost always favours restraint in order to ensure that the information concerned retains its confidential quality until trial".³⁰³ In this case, in order for an interim or interlocutory injunction to be accorded, the claimant must have established a strong *prima facie* case, which would most likely win during trial. The tests introduced by *American Cyanamid* have proved to be, over the years, limiting; the risk being that the importance given to the tests could, de facto, decide the case at the interim stage. In any preliminary proceeding, in fact, the court should try to avoid pre-judging the outcome of a case, "aiming to arrive at a position which will be as fair as possible (or as little unfair as possible) to both parties, whichever way the matter is finally

²⁹⁹ "When considering the adequacy of damages in cases of commercial information the court takes into account a number of factors. These factors include the extent to which the information has been circulated, the state of the market, the nature of the confidential information, the effect of the disclosure or misuse on the claimant or defendant's business, as well as some minor factors: the extent of circulation; the state of the market; the protection of abstract ideas; the going out of business" see Bently at 738-39.

³⁰⁰ *American Cyanamid v Ethicon* [1975] AC 396.

³⁰¹ See Bently at 1193.

³⁰² See *Gurry* at para 18.11.

³⁰³ However, "this test is widely used in other areas of intellectual property, in some circumstances ... the courts have decided not to apply this test in breach of confidence actions. This is particularly the case in relation to personal information, for which the courts have said that the threshold for injunction is higher than that of *American Cyanamid*" see Bently at 1193.

decided".³⁰⁴ In *A v B*³⁰⁵ the Court decided on a set of guidelines based on the balancing of the facts, rather than a general technical application of the law. By analysing the facts case by case, the theory of a contextual integrity that defines the events of the case, acquires formal importance in deciding which solution is better tailor-made for each case involving breach of confidence. The new tests have the scope to:

- determine whether the applicant will suffer irreparable harm if the injunction is refused; and
- find where the balance of inconvenience lies in granting or denying the injunction, or in other words, who between the applicant and the respondent will be most disadvantaged by the grant or denial of the interlocutory injunction.³⁰⁶

The importance of interim or interlocutory injunctions rests in their capacity to prevent the use and circulation of the information while the breach of confidence is being considered by a court.³⁰⁷ According to *Gurry*, once a confidence is breached it is lost forever; therefore it becomes imperative for the confider to take swift action to restrain the disclosure or misuse of confidential information before the trial.³⁰⁸ Interim injunctions prevent wrongdoers from benefiting from their wrongful acts prior to and during the trial; it also prevents defendants from benefiting from their acts during the time their actions are being assessed. In other words, an interim injunction is a temporary solution which freezes the facts, stops the circulation of any allegedly unlawfully acquired information while the breach of confidence is being considered by a court.³⁰⁹ The

³⁰⁴ Paul Stanley *The Law of Confidentiality: A Restatement* at 123.

³⁰⁵ *A v B* [2003] QB 195 (CA), 204-210 [11].

³⁰⁶ Jean-Philippe Groleau "Interlocutory Injunction: Revisiting the Three-pronged Test" (2008) 53 2 *McGill Law Journal* 269 at 270.

³⁰⁷ In order to ensure that the right holder's interests are not undermined during the period, provisions exist for interim orders.

³⁰⁸ "Not only can a confidence broken never really be restored, but, without an interim remedy, particularly where the information is personal, pursuing such claims may actually add to the embarrassment caused by the revelation" see *Gurry* at para 18.01.

³⁰⁹ "By their nature, interim injunctions are a separate action within a larger claim, but they can be essential in circumstances where a party wishes to preserve the status quo" electronic document <www.out-law.com/en/topics/dispute-resolution-and-litigation/injunctions/interim-injunctions> last visited on 20/04/2015.

request for an interim injunction implies that there is a serious question to be considered. It also implies that the defendant's actions, if unrestrained, could cause irreparable and immeasurable damage by continuing the conduct that has led to the dispute. The court will not prejudge the likely outcome of the litigation, and it has the discretion to grant the interim injunction or not. Based on common law, in *Gurry* it is specified that there are restrictions on the granting of interim injunctions and these restrictions are not based on jurisdiction, but on discretionary principles.³¹⁰ In other words, before granting an interim injunction, the court should first decide whether the question to be tried is serious enough and, if this threshold has been passed, the court should consider whether it would be fair to grant the interim relief while considering the strength of each party's case.³¹¹ In granting the interim injunction, the court also has power to assess whether the information will cause serious damage or not.³¹² In the cases where there is a breach of confidence, the importance to take action before the wrong has actually been committed is of crucial importance. Normally, in the history of interim injunctions, their importance as a remedy has been highly influenced by the possible effects that the granting or not granting of the injunction would cause to each party involved in the case at trial. As such they are still today based on discretionary principles. An injunction requires the proof that "there is a legal right which is threatened with infringement, and that common law damages would be an inadequate remedy".³¹³ Having said this, in general, interim injunctions are based on disputes that involve strong economic interests, but in general they are used to prevent:

- publication of obvious and defamatory lies;
- infringement of copyright, trademarks and other intellectual property rights;
- wrongful use of confidential information and trade secrets;
- on-going breach of contract;

³¹⁰ See *Gurry* at para 18.03.

³¹¹ See *Bently* at 1240.

³¹² "Any injunction may be drafted to prevent both improper disclosure and improper use. It may also be extended to the delivery up of documents which contain confidential information, even though they also contain information in the public domain. Any injunction to protect a confidence requires particularization of the information which the claimant is seeking to be kept confidential" see *Gurry* at 745.

³¹³ See *Gurry* at 731.

- activities which constitute a nuisance; and
- dealings with particular customers and suppliers.

In the case *Foster v Mountford*, the interim injunction was ordered by reason of the particular cultural and religious significance of the information. In light of this, the list above can be expanded by adding a new clause of particular importance to indigenous peoples: breach of cultural, secret confidence. In the case of indigenous peoples, in fact, an interim injunction represents a very useful tool to block the diffusion of very sensitive information that, customarily, cannot be revealed to outsiders. In weighing the case presented by indigenous custodians against defendants who have allegedly obtained the secret information in breach of a duty of confidentiality, the court should consider the cultural asymmetry of the parties involved and the resources they possess. In addition to that, it is morally and ethically unjust to attribute more value to the publication of a book (or photographs, videos and so forth) compared to the cultural harm that such disclosure would bring to the indigenous community. Financial gain should never be used to trump any claim for a breach of confidence that undermines the fundamental cultural rights of any given community. The same applies to the public interest defence analysed above. A cultural and anthropological 'curiosity' cannot be considered in the interest of the general public.

There is no need for pragmatic, philosophical arguing to support the importance that an interim injunction possesses: it simply blocks sensitive information that cannot circulate while a case for breach of confidence is being assessed by a court and a permanent injunction is pending. Obviously the claimant must bring a substantial case demonstrating that the information was unlawfully obtained by the defendant and that the circulation of the information during and after the trial would bring great, irreparable harm to the claimant. Any trial on breach of confidence involves a level of disclosure that might not be desired by indigenous claimants but, in the case of confidential information, the context and circumstances in which the information was acquired are crucial for the assessment of the events. Therefore, much of the secret information that

indigenous peoples seek to preserve does not need to be disclosed in order to be protected. The important facts to be analysed are whether a relationship of trust involving secret/confidential information existed, and whether such relationship was broken. Realistically, what could be prejudicial in judging any of the cases brought to a court by indigenous custodians of knowledge might be represented by any discriminatory consideration existent within the court. It is undisputable that, in the past, many cases brought by indigenous representatives were dismissed on the basis of discriminatory considerations that undermined the result of trials; however, while such behaviours were possible years ago, today it has become more difficult to discriminate against indigenous peoples on the basis of their underdeveloped culture and traditions. International law and human rights law have evolved to a point where not only indigenous peoples' legal personality is widely recognised, but their cultural rights are acknowledged and endorsed at the national and international levels.³¹⁴ Therefore, it should be possible nowadays for indigenous peoples to bring a claim for breach of confidence and win their case on the basis that their secret, sensitive information shared in confidence was unlawfully disclosed in breach of a pre-existing confidence. Once the interim injunction is granted on the basis of the seriousness of the case that will go to trial, indigenous peoples might obtain a permanent injunction that would reconfirm the interim injunction and block completely the circulation of the confidential information. A final or perpetual injunction "will order the defendant not to carry on with certain activities. As such, it is directed at future activities, whereas financial remedies operate in relation to past acts".³¹⁵ It is an equitable remedy and remains within the discretion of the court. It can be granted whether the case is based on contractual confidence or on an equitable obligation.³¹⁶ Generally, the law employs the type of remedies that balance the rights that were infringed. There is a difference between economic rights and cultural rights of sensitive/secret nature that might undermine the identity of a group of people. In this case, a permanent injunction would be advisable to stop the circulation of information

³¹⁴ See chapter 5.

³¹⁵ See Bently at 1250.

³¹⁶ See Gurry at para 18.48.

that are of proved secret nature. The limitedness of the information and the restricted circle in which it is known should prove the importance of maintaining the status quo and stop the circulation of information that was previously completely unknown to the general public (or a portion of it). In case the confidential information was imparted orally but transferred into physical form (like a book, record, photographs and so forth), the permanent injunction might order the destruction of the material. In such a case, the loss faced by the defendant might be purely economic. However, given that the reason for recording and selling the secret information was unjust enrichment, the destruction of any material that was never meant to be recorded, would simply bring the defendant to his initial position prior to the anticipated enrichment that the disclosure of the information was expected to bring.

Common Law is a constant evolving process in which cases determine the evolution of the law. In this rich context of contrasting forces the law is not regarded as a rigid set of rules, but as a flexible set of principles and criteria that can be amended or changed case by case. *Foster v Mountford* is proof that cultural privacy and indigenous secret information can be protected in court and permanent injunctions can be granted (although in this case geographically limited to the Northern Territory of Australia). The case demonstrates that it is not impossible to protect indigenous secret information using breach of confidence. From now on, it is up to scholars, courts and the law to evolve in the direction of a more inclusive system of rules that could better accommodate indigenous peoples' interests and expectations. This is not impossible. As Beverley-Smith clarifies in his book:³¹⁷

... leaving aside the controversial role of rules and principles in general jurisprudence, it is perfectly possible to refer to a master rule by which principles as well as rules of law may be identified. Accordingly a court must apply statutory provisions, rules of precedent and the *rationes decidendi* of cases, but in a case to which no statutory provision or *ratio decidendi* applies, in coming to

³¹⁷ Huw Beverley-Smith and others *Privacy, Property and Personality* (Cambridge University Press, New York, 2005) at 63.

its decision, the court must take into account principles derived from legislation, *rationes decidendi* of relevant cases and from relevant dicta. While legislation and binding precedent are the only ultimate sources of law, principles, which embody the persuasive sources, should not be excluded if only for the reason that they play a considerable part in the solution of legal problems to which no rule is directly applicable

10.11 - Final Recommendations

As the state of affairs show, while there is a growing consideration and respect for indigenous rights,³¹⁸ the way ahead for a 'real' protection of indigenous cultural rights and holistic way of living is still uncertain and left to the willingness of states to act. That is why the common law and common-law-derived systems (as systems of laws historically and legally diverse from countries with a civil law tradition³¹⁹) today represent one of the best avenues to protect indigenous secret knowledge. While it is up to countries to accept developments in the common law system, however, evolution of the law discussed by case law cannot be discarded as uninfluential.

Civil law and common law countries, in fact, share a distinctive heritage and a different legal tradition.³²⁰ Common law's main focus was originally on resolving the disputes at hand rather than creating legal principles that would be

³¹⁸ See Chapter 5 of the thesis.

³¹⁹ "Parliamentary legislation is the principal source of law in civil law countries. This legislation includes codes, separate statutes and ancillary legislation (e.g. Police Implementing Regulations to provide more details on the provisions of the Police Act). Within civil law countries, there is a hierarchy of laws. At the top of the hierarchy is the Constitution, followed by codes and other legislation (emanating from the executive or parliamentary branches depending upon the legal system), then executive decrees, then regulations, followed by local ordinances. Customs, as a rare source of law sits at the bottom of the pyramid and would rarely be relied upon in court. The reliance on codes and laws is a central characteristic of the civil law. At the heart of the civil law lies a belief in codification as a means to ensure a rational, logical, and systematic approach to law. Many civil law proponents believe that a code can address all circumstances that might need legal regulation, without the need for judicial interpretation and without the need for judges to refer to case law. Judges generally interpret codes and laws very strictly; the kind of expansive readings of existing legal provisions to create new interpretations, and by extensions, new law, is not done. Traditionally case law did not play any role in civil law countries as a source of law. The judge would decide each case based on codes or legislation and would not look to another case for guidance even if the facts were identical" see Vivienne O'Connor *Common Law and Civil Law Tradition* INPROL (International Network to Promote the Rule of Law) at 11-12 electronic document <<http://inprol.org/publications/11042/common-law-and-civil-law-traditions>> last visited on 04/11/2015.

³²⁰ "Legal tradition refers to a set of deep rooted, historically conditioned attitudes about the nature of the law, about the role of law in the society ... about the proper organization and operation of a legal system, and about the way the law is or should be, applied, studied, perfected and taught" see John H Merryman and Rogelio Pérez-Perdomo *The Civil Law Tradition* (3rd ed, Stanford University Press, Stanford, 1985) at 2.

articulated in a generally applicable code.³²¹ As such, common law is generally uncodified and is based on precedent.³²² Although common law has traditionally coexisted with other systems of law (canon law, urban and rural courts applied local customary laws, Chancery and maritime courts applied Roman law),³²³ it is largely based on precedent – *stare decides*; in other words, on judicial decisions that have already been made on similar cases.³²⁴ In this case, the role of judges becomes of fundamental importance in interpreting the law and basing their decisions on precedent cases. It is fair to say that in common law systems judges can de facto develop the law. Cases might indeed raise novel questions, and the judges must answer them. Their answers will often make law, whatever answers they make.³²⁵ This happened in *Foster v Mountford*, where the decision could not be based on precedents strictly related to indigenous cultural sensitive information because there was no existing precedent; however, the case presented features common to existing breach of confidence cases and could, therefore, be judged regardless and an injunction was discretionally awarded. Injunctions are not rewarded, they are ordered or awarded.

A civil law system could not contemplate such a result because its desire for certainty and purity of the law brings with it a level of rigidity that, contrary to common law systems, could not be melded to respond to changed circumstances or to be bent to the requirements of a particular case as happened with *Foster v Mountford*.³²⁶ On the same logic, breach of confidence and trust was employed because of its sui juris nature of contract or implied contract, proprietary rights and the principle of equity. Traditionally equity “refers to the power of the judge to mitigate the harshness of strict application of a statute, or to allocate property

³²¹ “Common law developed historically on a case-by-case basis from the bottom-up (namely from judges), rather than the civil law that has always been developed top-down by the legislature based on codes or legislation and would not look to another case for guidance even if the facts were identical” see Vivienne O’Connor *Common Law and Civil Law Tradition* INPROL at 11-12.

³²² “This means that there is no comprehensive compilation of legal rules and statutes” see *The Common Law and Civil Law Traditions*, the Robbins Collection, University of Berkeley electronic document <www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html> last visited on 04/11/2015.

³²³ *Supra*.

³²⁴ For more information on the historical origins of common law see John H Merryman and Rogelio Pérez-Perdomo *The Civil Law Tradition* (3rd ed, Stanford University Press, Stanford, 2007) at Chapter 8.

³²⁵ Tom Bingham *The Rule of Law* (Penguin, London, 2011) at 45.

³²⁶ “In the common law, certainty and flexibility are seen as competing values, each tending to limit the other. In the civil law world, the supreme value is certainty, and the need for flexibility is seen as a series of ‘problems’ complicating progress toward the ideal of a judge-proof law” see Merryman and Pérez-Perdomo at 49.

or responsibility according to facts of the individual case".³²⁷ Breach of confidence, being rooted in equity, covers the secrecy and confidentiality of the information and, once proved that a confidential relationship existed, that the knowledge shared was secret and of high sensitive nature and would cause great harm if disclosed, the judge could exercise discretion to decide to grant an injunction to restrict the publication of the book *Nomads of the Desert*. The message conveyed by the *Foster v Mountford* case proves that in common law systems judicial decisions exist to demonstrate that the law has recognised and agreed (to a certain extent) that indigenous secret information is unequivocally important and can be protected by breach of confidence. In doing so, common law has recognised the existence of new category of confidential information: cultural and spiritual information. In countries where civil law is very strong (eg France, Germany and Italy), on the other hand, the protection of indigenous secret information is left to legislation, which must be created ex novo to include and protect indigenous cultures and the role played by the guardians. The creation of such legislation is therefore left to the willingness of states and the efforts of scholars specialised in legal science. Yet, civil law countries may take into account evident development of the law happening in common law systems and, vice versa, statutory legislation can be created in countries based on common law. Where breach of confidence is unsuitable to protect indigenous secret knowledge, new statutes can come in help to guarantee protection to indigenous cultures. Noteworthy is the case of The Northern Territory Aboriginal Sacred Sites Act (1989)³²⁸ where a new law was created to acknowledge the indigenous holistic way of living and guarantee the preservation of Aboriginal traditions. With the Act it became an offence "to enter, remain, carry out works on or desecrate a sacred site anywhere in the Northern Territory".³²⁹ Initially

³²⁷ "It is a recognition that broad rules, such as those commonly encountered in statutes, occasionally work harshly or inadequately, and that some problems are so complex that it is not possible for the legislature to dictate the consequences of all possible permutations of the facts. Where problems like these are involved, it is thought better to leave the matter to the trier of the case for decision according to equitable principles. Equity thus is the justice of the individual case. It clearly implies a grant of discretionary power to the judge" see Merryman and Pérez-Perdomo at 49.

³²⁸ The Northern Territory Aboriginal Sacred Sites Act (1989) entered into force on 3 March 2004.

³²⁹ "Other enduring aspects of today's legal protections for Northern Territory sacred sites were also established, such as a board largely made up of Aboriginal custodians nominated by the Northern Territory's Aboriginal Land Councils, and a clear definition of a sacred site" see electronic document <www.aapant.org.au/about-us/history> last visited on 26/09/2015;

conceived as Aboriginal Land Rights (Northern Territory) Act 1976³³⁰ in August 1986, it was decided to revise the existing legislation relating to territories of spiritual significance for Aboriginal people. In 1986 the then chief Minister, Mr Stephen Hatton, appointed a committee to review legislation relating to sites of significance to Aboriginal people. These legislation included the Aboriginal Sacred Sites Act, the Aboriginal Land Act and the Native and Historical Objects and Areas Preservation Act, and these were included into the revision. In 1988, the Territorial Legislature came out with new recommendations including:

- establishing a statutory authority to coordinate requests for protection and initiate prosecutions;
- giving power to the Authority to grant access and/or carry out work on sacred sites, only after taking into account the wishes of Aboriginal people;
- accept in principle that sites of significance to Aboriginal women should be dealt with by Aboriginal women; and
- developers should be encouraged to consult with the Authority on sacred sites at an early stage in their planning processes.³³¹

The Northern Territory Aboriginal Sacred Sites Act stands as a keystone legislation. Not only did it increase the presence of Aboriginal representatives within the Authority Board, but the Authority was requested to collaborate closely with Aboriginal custodians on every issue directly related to sacred/secret sites of spiritual significance.³³² The Act follows the logic of the

³³⁰ Aboriginal Land Rights (Northern Territory) Act 1976 No 191, 1976, last amended in 2013.

³³¹ The Government continued negotiations with the Authority and Aboriginal Land Councils over amendments to the sacred sites legislation. The Authority's independence was seen as important in the resolution of difficult issues in relation to sacred sites and any proposed development in and around sites. These were difficult negotiations, and in the end the final product was the Northern Territory Aboriginal Sacred Sites Act 1989 which was passed on 26 May 1989 and came into force on 15 August 1989.

³³² "The Act increased Aboriginal membership on the Authority Board to twelve members, with the specification that men and women be equally represented. As recognised in the Martin Review there was a need to include women on the Board so that the Board could consider sites specifically significant to women. In accordance with traditional law it would be culturally inappropriate for men to consider women's sites as it would be inappropriate for women to consider men's sites. Since the new Sacred Sites Act a significant amount of women's sites have been registered by the Authority. The new Act prescribed new functions for the Authority which significantly altered the nature of its work and expanded its

recommendations given by the Waitangi Tribunal on Wai 262 that indigenous peoples' lives and cultures must be respected in all their holistic features and steps must be taken to recognise and respect the fundamental role of the guardians of knowledge. Such respect must be extended to indigenous practices, and especially to those practices that are sacred and secret and strictly guarded by the custodians. In analysing indigenous sacred knowledge, the Wai 262 Report advises that the best way to protect the knowledge that is mostly sensitive and secret is to keep it secret. This means that, in order to do so, indigenous peoples should:

- restore and enforce the customary laws that safeguard indigenous peoples' most spiritual and secret knowledge;
- control the knowledge by allowing the guardians to perform their duty of care according to the customary laws; and
- avoid sharing the knowledge with people who are not entitled to enter into contact with the secret knowledge.

According to the Wai 262 Report the key to successfully do this in Aotearoa-New Zealand rests in the key figure of the kaitiaki. By allowing the kaitiaki to perform correctly their role as traditionally mandated, the secret knowledge can be protected.

The fact that still today indigenous representatives can hardly enter the international forums that discuss their issues and rights is illogical, shameful and discriminatory. The same applies to the selection of such representatives and their level of knowledge of the traditions of the community they intend to represent. Such selection cannot be random, or discretionary or influenced by the interests of multinationals. The guardians and elders should be constantly informed of what happens within the state and at international level and decide whom to send to attend those forums. The participation of indigenous peoples in

operations. The Authority, where requested was now required to carry out surveys and consultations with custodians to determine the constraints imposed by the existence of sacred sites to work on land and waters anywhere in the Northern Territory. An Authority Certificate specifying the conditions under which work may be undertaken in the vicinity of a sacred site would then be issued. A time limit was placed on the commencement of consultations" see electronic document <www.aapant.org.au/about-us/history> last visited on 26/09/2015.

the affairs of a state cannot be discretionary as it has been so far. States should also recognise that although the special relationship between the guardians and sacred/secret knowledge cannot be considered as constituting ownership of the information held in custody, such 'special' relationships, as suggested by Wai 262 recommendations, must be taken into 'special' consideration, especially when assessing indigenous peoples' issues related to the most secret and sensitive of their knowledge. The same respect should be extended to the guardians' decisions on when and how (if ever) sharing their knowledge. The 'context', 'circumstance', 'reasons' and 'consequences' of such sharing should be considered while assessing indigenous claims.

We live in a society where confidences are shared all the time and many of them are disclosed afterwards. Technology has facilitated the circulation of information at an unprecedented pace. Hardly any secret remains secret for long. Yet, the circulation of confidential information can have dire consequences. That is why states should protect, expand and enforce confidentiality and create laws that better protect any keeper or confider of secret information. Agreements specifically treating sensitive, spiritual matters as confidential should be enforced when no public policy has been violated; and contractual confidential agreements (express, implied etc) should be enforced like any other contract. Additionally, once in court, very sensitive, spiritual information should be treated differently and holistically, and indigenous claimants should be accorded by the law exemption from the obligation to give any evidence at all in certain proceedings where it is clear that no public policy has been violated and it is evident that the confidence is highly sensitive and could cause great harm to the community and its members.

In light of what is stated in the UNDRIP, confidentiality law (and the law in general) should help indigenous peoples "to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions" (Art 31). How? By allowing indigenous holders of secret knowledge to manage their secret information according to their traditions; by granting interlocutory injunctions and, when necessary, final injunctions to secret and

very sensitive information. In assessing issues on a case by case, courts should develop an understanding and respect for indigenous culture while:

- taking into account the holistic nature of most of indigenous knowledge;
- fully recognising the 'special' relationships that the guardians of knowledge have with the culture held in their custody;
- supporting the existence of such relationship;
- consulting with indigenous guardians and elders in those cases where the protection of sacred/secret knowledge is decided;
- enforcing a duty of confidence over the individual in relation to the community to which he/she belongs;
- encouraging the introduction of mandatory interlocutory injunctions for all the secret information which might be of a very sensitive, spiritual nature;
- making more use of permanent injunctions in those cases where the divulgence of confidential secret information might cause great harm to a community;
- redefining and harmonising all those statutes that, like the tort of privacy, are today still ill defined;
- recognising a new confidentiality law: the one on cultural secrets;
- giving greater importance to the contextual integrity of any information: how and why the information is secret and why it should remain as such;
- giving strict consideration for any surreptitious acquisition of secret knowledge;
- considering any knowledge acquired surreptitiously, deceitfully or in a manner contrary to the customary laws of a community and preventively block its circulation by an interlocutory injunction while the case is analysed and discussed by the court;
- if the information is acquired surreptitiously, deceitfully or in a manner contrary to the cultural and human rights and the customary laws of a community, the 'public interest' clause should be automatically dismissed by any court and the publication blocked or denied; and
- declining to apply the public interest defence in those cases where the secrecy is strictly traditional and therefore not pertinent to the national state of affairs.

Our modern world thinks in numbers. Everything that has economic value should be exploited for the greater good. The truth is that such exploitation is never for the greater good and only few benefit financially from the exploitation of indigenous resources and cultures. Unfortunately, most of our modern laws protect the economic interests of the few at the disadvantage of the many. The fact that indigenous peoples might think and live holistically must be recognised and accepted once and for all. At the same time, recognition must be given to their secret practices and their desire to keep them secret. It is possible in some jurisdictions to use legislation already in existence to meet these goals or, where necessary, expand or create new laws. As seen in this chapter, the law on breach of confidence is today at a promising stage. However, it needs to be protected, expanded and harmonised to become a clear body of law. Privacy law and breach of confidence should be either harmonised and integrated or revised to include the protection that the other is lacking. In those states where privacy and confidentiality law use distinct, different rules, the dividing line should be identified and the moral, ethical and legal factors identified or clarified. Leaving too much interpretation to judges might create contradicting precedents and consequently prevent uniformity.

Yes, the way ahead seems long. However, things seem to be moving in the right direction. Only time and the willingness of states can determine how long it is going to take to finally amend laws that will be considerate and inclusive of indigenous peoples' interests.

Conclusion

This thesis has taken an interdisciplinary and comparative approach to the complex topic of indigenous secret knowledge and guardianship.¹

In the initial part, this thesis has historically contextualized indigenous peoples and described indigenous cultures and traditions from a holistic point of view, explaining why the role played by the guardians is essential for the preservation of indigenous culture.

In this context, framing colonization from a philosophical and anthropological point of view proved to be important to demonstrate that many of the ideologies that brought colonisers to subjugate indigenous peoples somehow persist today in the resistance of states to creating and implementing effective laws that would safeguard indigenous cultures. In many places of the world, indigenous peoples are still marginalized minorities and subject to discrimination.

Indeed, indigenous claims cannot be dismissed on the basis of their fading peculiar nature. Indigenous peoples are here to stay, and, like any other legal entity, are seeking responses that are inclusive of the contextual integrity of their claims. The fact that sacred/secret information of an intangible nature is still today in the hands of indigenous custodians is essential for the preservation of the knowledge. However, what the law needs to do, and what the law is slowly doing, is including indigenous reasoning in any general legal discourse that can be relevant to any legal entity. The aim of the thesis has been to show that it does not matter who the legal entity is: what is important is to listen and accommodate the needs and expectations of any member of the global family who might have any issue regarding the system regulating it.

The international legal system today acknowledges that indigenous peoples have custodians who take care of their most sacred/secret knowledge; the same system must accommodate indigenous custodians' needs and expectations to

¹ In the case of indigenous secret knowledge, complexity has been mainly due to the limited existing literature on the subject.

have their secret information respected and protected against external disclosure. The thesis proposes how this can be done.

In the last few decades, the law has slowly moved to accommodate some aspects of indigenous claims and expectations. The Chapters 4-9 of the thesis have reviewed legal progress to date, and established what still needs to be done to effectively protect indigenous peoples' traditions in relation to secret and sacred knowledge. Chapter 4 is dedicated to explaining who the guardians of knowledge are and why their role is so important in the preservation of indigenous traditions. Chapter 5 discusses indigenous peoples and international law with the intent of analyzing the role played by indigenous peoples in international law. Chapter 6 explains and contextualizes indigenous peoples' culture within human rights and intellectual property law systems preparing the reader for the complex analysis of the case study on Wai 262 (chapter 7).

The chapter on Wai 262 provided what is today the best example and the most thorough study of how states might accommodate indigenous peoples' needs and expectations within their national borders. The Wai 262 report is very thorough in describing the delicate and multifaceted role of the guardians/kaitiaki, and it explains how the state and kaitiaki can work together to protect Maori secret knowledge. In the Wai 262 report the Waitangi Tribunal does not deny that it is difficult to assess and protect the knowledge that is mostly sacred and secret, however, by giving great importance to the role of the kaitiaki, such protection can become more effective. Once kaitiaki are left free to manage their knowledge, they will traditionally know how to safeguard the knowledge they hold in custody. Wai 262 suggests that it is the relationship between guardians and secret knowledge that must be protected. The same idea is embodied in the action for breach of confidence. As chapter 10 has proven, secret information is strictly bound to the role of the holder of the knowledge.

Chapters 8 and 9 have explained why intellectual property law systems are today still inadequate instruments to protect secret knowledge. While IP law is slowly addressing indigenous peoples' issues, when it comes to secret knowledge, not much has been done. This because it is difficult to address secrecy as such. Being

focused on new inventions and the fixation of ideas in material form, IP rights remain unsuitable for all the information that is secret and intangible.

Essentially, it is true that indigenous peoples are still widely discriminated against and that our modern world is driven by economic reasoning that ignores the cultural values that survive in many indigenous communities. However, it is also true that 'secrecy' and 'confidentiality' are common to every society of the world.

In this regard, this thesis has proven in chapters 6, 8 and 9 that, while international human rights instruments seem at present to better respond to the violation of indigenous cultural rights than the intellectual property law system as currently configured, breach of confidence is at present the best avenue to address secrecy and protect information shared by indigenous guardians in confidence. Undeniably, while the best way to preserve any secret information might be to keep it secret (as suggested by the recommendations in Wai 262), nonetheless indigenous secret information entails a level of disclosure that, although limited to a restricted group in a given community, is still shared in confidence and under the mutual understanding that will remain confidential. Strict legal codes customarily enforced within indigenous communities make sure that no disclosure to the uninitiated takes place. However, disclosure can happen even in secretive contexts. In this case, by focusing on 'secrecy' itself and not on the nature of the information held secret, breach of confidence can protect indigenous secret information from harms that can come from within the community as well as from outside.

The final chapter of the thesis has shown that the action for breach of confidence can include indigenous peoples' claims, needs and expectations. There is space for flexibility and inclusiveness within the common law on confidence and its moral, ethical and cultural contextual integrity to make it a valuable and effective instrument for the protection of indigenous secret knowledge. The law on confidence is also structured in a way that not only protects the secret itself, but recognizes the role played by the holder in keeping it secret. By granting interlocutory and final injunctions, not only can the secrecy

be protected, but also the confidential relationship between the guardians and the knowledge in their custody. As such, the protection of the law on confidence is extended to the privileged role of the guardian of knowledge as keeper of secret information.

The thesis argues that indigenous custodians (and their advocates) should, in the current climate, work within the existing system regardless of how imperfect it is to create compromises that would make it inclusive of indigenous peoples' expectations. Breach of confidence and privacy law might not be the ideal solution to indigenous issues, but they have a very long tradition in the Common Law system. As *Foster v Mountford* has clearly demonstrated, the common law of breach of confidence has potential to evolve to meet the needs and expectations of our global society. What the thesis suggests is that there are today avenues in which indigenous claims have been presented with some success, and that there is potential for the law to develop and be used to the advantage of all the indigenous custodians who wish to retain their control over their sensitive, secret information.

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